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NOTES OF RECENT CASES.

Krishnaswami Aiyangar, J. 3rd December, 1940

Raju Chettiar and others *v.* Ramakkal and others.

C. M. A. No. 45 of 1939.

Civil Procedure Code (V *of* 1908), *O.* 17, *r.* 1 *and O.* 33, *r.* 8—*Suit in forma pauperis—Trial—Plaintiff not ready—Grant of adjournment conditional on paying day costs within next hearing—Costs not paid—Power of Court to dismiss suit—Pauper, if exempted from payment of adjournment costs.*

In a suit filed *in forma pauperis,* the plaintiff was not ready at the date of the hearing and the Court adjourned the case on condition of the plaintiff paying day costs to the defendants within the next hearing date. On the adjourned date, the plaintiff did not pay the costs.

Held, the Court has jurisdiction under O. 17, r. 1, C.P Code, to pass a conditional order of adjournment on payment of costs by the plaintiff on failure of which the suit should straightaway be dismissed. 21 M. 408; A.I.R. 1928 M. 786, followed.

Held, further, that under O. 33, r. 8, a pauper plaintiff is not exempted from the payment of costs of adjournment; the Court has therefore power to direct him to pay the costs of an adjournment granted at his instance. 6 B. 561, followed; 47 B. 104, not followed.

K. Raja Aiyar and *V. Seshadri* for Appellants.

R. Desikan for *G K. Damodara Rao* for Respondents.

K.S.

Wadsworth, J. 5th December, 1940.

M. Achuthan Nair *v.* T. Achuthan Nair.

C. R. P. No. 1315 of 1938.

Limitation Act (*IX of* 1908), *S.* 25—*Scope—Promissory note bearing both English date and Vernacular date—Inconsistency—Computation of time for limitation—Evidence as to date of note—Admissibility—Evidence Act, S.* 96

A promissory note bore both the English date 16—11—1934 and the Malayalam date Thulam 30, 1110, corresponding to 15th November, 1934. In a suit on the promissory note filed on 16—11—1937,

Held, that S 25 was not applicable. There is no presumption as to whether the vernacular or the Gregorian calendar is to be taken into account. S 25 only says that the date must be computed according to the Gregorian calendar, As there has been a dispute as to the date on which

the promissory note was executed the Court was entitled under S. 96, Evidence Act, to decide as to when the suit promissory note was executed.

A. Achuthan Nambiar for Petitioner.

K. S Sundaram for Respondent.

K.S

Wadsworth, J.
5th December, 1940

Vunnava Rangayya *v.* Panchayat Board, Angalakudur by its President.
C. R. P. No 988 of 1938.

Madras Local Boards Act (*XIV of* 1920), *Ss.* 212 *and* 168—Kolagaram *tax—Farming of right to collect—Legality.*

The Local Boards Act does not expressly or impliedly authorise the farming out the right to collect any tax levied under the Act (though license fees may be farmed out under Ss. 168 and 212 of the Act) and therefore such farming out must be taken to be prohibited. 36 Mad. 118 and 21 M.L.J. 788, followed.

A. Lakshmayya for Petitioner.

N. V. B. Sankara Rao for Respondent.

K.S.

[F. B.]
The Chief Justice, Gentle and Krishnaswami Aiyangar, JJ.
5th December, 1940.

Karuppa Goundan *v.* Minor Narashimman and others.
C.M.A. No. 501 of 1939 and C.M.S.A. No. 114 of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 28—*Rules framed under S.* 28—*Provision for right of appeal*—Ultra vires *the Government—Proceedings under S.* 19—*Whether proceedings in execution appealable under C P. Code, S.* 47.

An appeal does not lie as of right but must be conferred by express enactment. Rule 8 made under S. 28 of the Madras Agriculturists' Relief Act providing for appeals is *ultra vires.* Proceedings under S. 19 of the Act to scale down decrees are not proceedings in execution and no appeal will lie under S. 47, C.P.Code.

K. Rajah Aiyar, V. Seshadri, P. J. Kuppanna Rao and *V. C. Veeraraghavan* for Appellant.

R. Kesava Aiyangar and *R. Ramamurthi Aiyar* for Respondents.

K S.

[F. B.]
The Chief Justice, Venkataramana Rao, Abdur Rahman, Krishnaswami Aiyangar and Horwill, JJ.
6th December, 1940.

Chinnasami Pillai *v.* Annamalai Chetty.
A.A A.O. No. 72 of 1938.

Limitation Act (*IX of* 1908), *Art* 182 (5)—*Transfer of decree to Court in Native State having reciprocal arrangement with British Indian Government—Whether 'step in aid of execution'.*

A money decree obtained in a British Indian Court was transferred on 25th January, 1932, for execution to the Chief Court, Pudukottah State, which had a reciprocal arrangement with the British Indian Government for executing decrees. The decree was retransferred after infructuous steps in the Native State to the British Indian Court on 29th September, 1936 and an execution petition was filed on 10th October, 1936.

Held (*Horwill, J., dissenting*), the application to transfer the decree to the Native State was a step in aid of execution. I.L.R. 40 Mad. 1069 (F.B.), overruled.

C. A. Seshagiri Sastriar for Appellant.
A. V. Viswanatha Sastri and *N. S. Srinivasan* for Respondent.
K.S.

[F. B]
The Chief Justice, Gentle and Krishnaswami Aiyangar, JJ.
10th December, 1940.

Pechiappa Chettiar *v.* Vazhukka Chetty.
C.R.P. No. 880 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 15—*Applicability to a tenant who had surrendered the holding before the commencement of the Act.*

A suit was filed for recovery of the arrears of rent for the year 1935-1936. The tenancy had terminated by the surrender of the holding by the tenant in April, 1936. The defendant (tenant) contended that the arrears of rent had been wiped out by virtue of S. 15 of Madras Act IV of 1938.

Held, (*a*) that two conditions are necessary for the application of the section: (*i*) That the tenancy should be subsisting on the date of the commencement of the Act. (*ii*) That the rent for faslis 1346 and 1347 must be due from the tenant and that he should deposit the same on or before 30—8—1938.

(*b*) S. 15 of the said Act is not applicable to this case.

C. K. Viswanatha Aiyar for Petitioner.
C. V. Mahadeva Aiyar for Respondent.
K.S.

Wadsworth, J.
10th December, 1940

Kuppiah Chetty *v.* Saraswathi Ammal and others.
C.R.P. Nos. 1255 of 1937 and 540 of 1938.

Presidency Small Cause Courts Act (XV of 1882)—*Two judges hearing a Full Bench application—Third judge also signing the judgment by mistake—Validity of judgment—Findings of fact—If can be interfered with by Full Bench.*

When two judges heard the application and three judges signed the judgment but the third judge did not participate in the preparation of the judgment,

Held, that the judgment is not invalid.

Held, further, that the Full Bench of the Small Causes Court cannot interfere with findings of fact of the Trial Court and if it does so the High Court can interfere in revision. 40 Mad. 855 (F.B.), followed.

Case-law as to what would constitute a valid transfer of shares discussed. 50 Bom. 360 (P.C), followed.

K. S. Sankara Aiyar and *A. K. Sreeraman* for Petitioner.
K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Respondents.
K.S.

King and Patanjali Sastri, JJ.
10th December, 1940.

Thillai Govinda Pillai *v.* Nicholas Rayar and another.
A.S. No. 127 of 1938.

Contract—Breach—Waiver.

The first respondent had entered into a contract with the second respondent to prepare the earth-work for part of a railway. One of the terms of the contract provided that the benefit or burden of the contract was not assignable. The contract also provided for its termination in the event of such assignment.

The first respondent entered into a partnership with the appellant and executed a power of attorney also in his favour, the result of which was that the appellant had to finance the contract and receive the monies from the railway company—the 2nd respondent. The power of attorney which

referred to the partnership agreement was deposited with the railway company who issued cheques to the appellant and never repudiated this contract with the 1st respondent.

After completion of works the appellant sued for the balance of money due from the 2nd respondent. The defence of the 2nd respondent was that the contract precluded recognition of any assignment.

Held, that the partnership and the power of attorney executed by the 1st respondent to the appellant amounted to an assignment of the benefits of the contract but that the 2nd respondent who had full knowledge, never exercised the option to repudiate and must be deemed to have waived his rights.

Quaere: Whether a term of a contract against assignment was valid and enforceable.

L.R. 3 Q.B.D. 569 and 12 Ves. 504, referred to.

K. V. Ramachandra Aiyar and *T. R. Ramabhadrachari* for Appellant.
A. Dorairaj for 1st Respondent.
King and *Partridge* for 2nd Respondent.

K.S.

Wadsworth, J.
11th December, 1940

Sreepathi Bellah *alias* Balagurumurthy and another *v.* Darsi Ramayya and another.

C.R.P. No. 1223 of 1940.

Civil Procedure Code (*V of* 1908), *Ss.* 148 *and* 151—*Application to set aside* ex parte *decree—Order setting aside—Conditional on payment of costs within one month and in default application to "stand dismissed with costs"—Power to grant extension for payment of costs—Inherent powers.*

The District Court passed an order allowing an appeal against the order of the District Munsiff refusing to set aside an *ex parte* decree on condition of the appellant paying the respondents Rs. 15 as costs within one month; in default the appeal was to "stand dismissed with costs". Within the one month's time appellant paid Rs. 12 to the respondents *bona fide* believing that the entry in the Court diary showing Rs. 12 as costs payable to the respondents was correct. Finding later that Rs. 15 and not Rs. 12 had been ordered to be paid the appellant applied long after the original order worked itself out to extend time. The District Court granted extension. In revision against the order of the District Court,

Held, (1) that the Court had no jurisdiction to extend time after the time granted originally expired in cases of orders which run as "stand dismissed with costs";

(2) that however the lower Court's order could be upheld on the theory of mistake of Court which should not prejudice a party. As the party was misled into paying Rs. 12 instead of Rs. 15 by reason of the wrong entry in the Court diary, time can be extended under the inherent powers of the Court.

Kasturi Seshagiri Rao for Petitioners.
W. Kothandaramayya for Respondents.

K.S.

[F.B.]

The Chief Justice, Venkataramana Rao, Abdur Rahman, Krishnaswami Ayyangar and Horwill, JJ.
17th December, 1940.

Venkateswara Sarma *v.* S. N. Venkatesa Iyer and others.

Appeals Nos. 26 and 27 of 1937.

Limitation Act (*IX of* 1908), *Arts.* 134-B *and* 144—*Alienation by manager of Hindu Religious Institution for valuable consideration—Interval bet-*

ween death of such manager and election or appointment of his successor —Limitation and adverse possession—Starting point.

A Matathipathi who had made alienations between 1876 to 1910 died on July 7, 1918, without nominating a successor. The disciples of the Mutt appointed the successor on June 6, 1922. The successor instituted a suit to set aside the alienations on April 12, 1934, claiming that his right to sue accrued on the date of his appointment,

Held (*Abdur Rahman and Krishnaswami Ayyangar, JJ., dissenting*), that Art. 134-B was directly applicable to the facts and even if Art. 144 should be applied, adverse possession of the alienees would have started from the date of the death of the alienating manager and the suit was barred by limitation.

Per *Abdur Rahman and Krishnaswami Ayyangar, JJ.*—The residuary Art. 144 applied to the facts and until there was a person capable of suing in existence there could be no question of adverse possession.

P. Govinda Menon for Appellant.

B. Sitarama Rao, A. V. Viswanatha Sastri, A. C. Sampath Aiyangar, N. C. Vijiaraghavachariar and *D. Ramaswami Aiyangar* for Respondents.

K.S.

Wadsworth, J.
18*th December*, 1940.

Narasareddi *v.* Thummuru Ranga Reddi.
C.R.P. No. 1894 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Scope—Promissory note on 1—7—1933 in renewal of an earlier one—Payments and appropriations towards interest and principal of renewed note made before 1—10—1937—If can be re-opened.

A promissory note was executed on 1—7—1933 for Rs. 391-15-1 in renewal of an earlier promissory note for Rs. 255-15-0. The debtor had paid on 4—9—1934 Rs. 26-5-2 towards interest and Rs. 110-2-10 towards the principal of the renewed promissory note of 1—7—1933. In a suit on the promissory note filed on 4—9—1937 for the balance of principal and interest,

Held, that the appropriations made on 4—9—1934 cannot be undone and on that date the principal of the suit note was reduced to Rs. 281-12-3. (Rs. 255-15-0 principal originally advanced and Rs. 25-13-3 interest.) The principal of the renewed promissory note will be Rs. 255-15-0 and interest thereon outstanding on 1—10—1937 will be cancelled.

V. Subramaniam for Petitioner.

K. Kameswara Rao for Respondent.

K.S.

King and Patanjali Sastri, JJ.
20*th December*, 1940.

Subramania Iyer *v.* Ulagalum Perumal Sethurayar.
Appeal No. 243 of 1934.

Receiver in management during the pendency of succession suit relating to an impartible estate borrowing money on promissory note for paying peshkush*—Suit on pronote—Whether creditor can get decree against estate.*

Where a receiver in management of an impartible Zamindari during the pendency of a succession suit relating thereto borrowed money on a promissory note for paying *peshkush* due to Government in respect of the estate and in a suit on the note, the creditor sought to obtain a decree not merely against the maker but also against the estate,

Held: (1) A decree can be given against the estate only to the extent of any indemnity which the receiver may have against it,—no charge having been created in favour of the creditor at the time of the borrowing.

(2) The principle of the Full Bench decision in 42 Mad. 185 by which the estate of a minor could be bound by a debt incurred by his guardian could not be extended to the case of a debt incurred by a receiver.

(3) The estate cannot be bound on the principle of justice and equity that one who has enjoyed a benefit should also be bound by the obligation created by the arrangement under which such benefit was derived.

30 Cal. 397, dissented from.

(4) The creditor will not be entitled to be subrogated to the first charge available to Government in respect of *peshkush*.

A.I.R. 1936 Mad. 752, explained.

T. M. Krishnaswami Aiyar and *P. N. Appuswami Aiyar* for Appellant.

S. Venkataraman, A. Swaminatha Aiyar and *N. Rajagopala Aiyangar* for Respondents.

K.S.

[F.B.]

The Chief Justice, King, Somayya, Patanjali Sastri and Happell, JJ.
20th December, 1940.

Sivagurunatha Pillai *v.* Padmavathi Ammal.
S.A. No. 1093 of 1937.

Negotiable Instruments Act (XXVI of 1881), *S.* 27—*Scope—Exclusion of personal liability—Surrounding circumstances—Whether can be looked into in construing a promissory note—Evidence* de hors *the instrument—Admissibility.*

A promissory note was executed in favour of *X* by one *S*, son of *V*, the husband and agent under power of attorney of *P* reciting that it was 'in respect of the debt due by *Sh*, my wife's junior paternal uncle'. *X* instituted a suit on the note both against the maker *S* and his wife *P*. The claim against *P* was on the footing that *S* executed the note in his capacity as a power of attorney agent of his wife, with due authority to execute the suit note. The first Court gave a decree against *P* and dismissed the suit against *S*. On appeal by the plaintiff, the District Judge dismissed the suit against *P* and granted a decree against *S* following 38 Mad. 482=25 M.L.J. 425. On Second Appeal,

Held, that both under the English law and the Indian law, the liability under a promissory note must arise upon the language of the note itself and without resorting to surrounding circumstances or other evidence *de hors* the instrument.

(1816) 5 M. & S. 345=105 E.R. 1077 and (1858) 3 H. & N. 177=157 E.R. 434, followed.

(1925) 2 K.B. 301, explained.

58 Mad. 735=68 M.L.J. 540, dissented from.

S. 27 of the Negotiable Instruments Act is differently worded from S. 26 of the Bills of Exchange Act in that under the Indian Act the exclusion of the liability of the agent can be inferred from the whole of the pronote, while under the English Act, the agent must exclude his liability only by suitable additions to his signature on the note.

38 Mad. 482=25 M.L.J. 425, dissented from.

The words occurring in the note that the maker was the power agent of his wife were not merely descriptive but sufficiently apt to connote that the maker was executing it only in his capacity as agent. In construing promissory notes written in vernacular, regard must be had to the habit of people executing them and their customary mode of expression.

Judgment of Sundarayyar, J., in 23 M.L.J. 417, approved.

K. Rajah Iyer and *S. Ramachandra Ayyar* for Appellant.

T. S. Venkatesa Iyer, G. R. Jagadisan and *N. C. Vijayaraghavachariar* for Respondent.

K.S.

Wadsworth, J.
4th December, 1940.

Srinivasa Rao *v.* Seelu Reddi and another.
C.R.Ps. Nos. 1103 and 1104 of 1938.

Civil Procedure Code (V of 1908), *O.* 21, *rr.* 85 *and* 86—*Failure by auction-purchaser to pay cost of general stamp for the sale certificate in time --Effect.*

Where an auction-purchaser paid the sale price on the date of the sale but by oversight omitted to pay also the cost of the general stamp for the sale certificate within 15 days as required by the amended r. 85 of O. 21, Civil Procedure Code,

Held, that there is no power to excuse the delay and the consequences set out in r. 86 must ensue.

43 M.L.J. 477, relied.

K. Kuppuswami for Petitioner.

Respondent not represented.

K.S.

Wadsworth, J.
4th December, 1940.

Appukutta Menon *v.* Narayanan Nambudripad.
C.R.P. No. 2551 of 1939

Madras Agriculturists' Relief Act (IV of 1938), *S.* 15 (4) *and Malabar Tenancy Act, S.* 8 (*b*)—*Application by tenant—Forum.*

Reading the explanation to S. 15 (4) of Act IV of 1938 along with S. 8 (*b*) of the Malabar Tenancy Act, a tenant applying for the benefits of S. 15 (4) must go to the same Court as the landlord suing for possession against his tenant. Where the landlord who would clearly have no claim possession by redeeming a kanom would have to go to the Court of the Subordinate Judge, the tenant applying for the benefits under S. 15 (4) of Act IV must also go to the Court of the Subordinate Judge.

K. Kuttikrishna Menon for Petitioner.

P. G. Krishna Aiyar for Respondent

K S.

Wadsworth, J.
13th December, 1940.

Kamalathammal *v.* The Official Receiver, West Tanjore.
C.R.P. No. 956 of 1939.

Insolvency—Settlement by insolvent prior to adjudication on his wife—Addition of minor son with himself as guardian—If changes the character of the transfer—Liability to be set aside.

Where a joint family manager before his adjudication settled the family properties on his wife that settlement would have to be made by him as manager and would get no additional validity by the mere addition of the minor son's name with his father as guardian. Such a transfer is in essence a transfer by the insolvent and is liable to be set aside in its entirety.

Decision of Pandrang Row, J., (1937) 2 M.L.J 427, followed.

Decision of Sundaram Chetty, J., A I.R. 1935 Mad. 246, not followed.

K. S. Desikan for Petitioner.

R. Rajagopala Iyengar for Respondent.

K.S.

Wadsworth, J
16th December, 1940

Unneeri Nair and another *v.* Krishna Aiyar.
C.R.P. No. 1519 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 19—*Decree passed on* 25—3—1938—*S.* 19 *of Act IV not applicable.*

N.R.C.

Where a decree was passed on 25—3—1938, that is, three days after Act IV of 1938 came into force an application under S. 19 is not open to the judgment-debtor.

P. Govinda Menon for Petitioners.

N. R. Sesha Aiyar for Respondent.

K. S.

Wadsworth, J.
18th December, 1940.

Raman Chettiar *v.* Perumal Udayar.
C.R.P. No. 1707 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 9 *and* 19—*Plaint for balance of principal and interest on renewed pro-note after appropriation—Re-opening not permissible.*

The respondent on 26—6—1932 executed a promissory note for Rs. 668 in renewal of two earlier notes, the principal of which totalled Rs. 350. On 26—6—1934, Rs. 111-8-0 was paid for interest and Rs. 323 was paid for principal leaving a balance of Rs. 140 due. On 15—12—1934, Rs. 8 was paid for interest and Rs. 40 for principal leaving a balance of Rs. 100. A suit was filed in December, 1937 for Rs 100 and subsequent interest and a decree was given on 4th March, 1938. On an application to scale down the decree,

Held, the parties actually intended to appropriate these payments towards the real principal of the suit promissory note, which comprised both principal and interest of the earlier notes. The debtor cannot prove that there was an appropriation to the principal only of the earlier notes or that any interest was left outstanding on those notes to be cancelled as on 1—10—1937. The creditor is entitled to a decree for Rs. 100 with interest at 6 1/4 per cent. per annum from 1—10—1937 up to the date of the decree and subsequent interest at 6 per cent and costs and interest thereon at 5 per cent. up to 22—3—1938 and thereafter at 6 per cent. per annum.

M. S. Vaidyanatha Aiyar for Petitioner.

T. V. Ramanatha Aiyar, for Respondent.

K.S.

Mockett and Krishnaswami Iyengar, JJ.
20th December, 1940.

Easwarappa Goundar and others *v.* Hanumantharaya Goundan.
C.M.P. No. 5059 of 1939 in A.S. No. 169 of 1936.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 *and* 9—*Decree for mesne profits for* 3 *years prior to suit by Court of Appeal in* 1939 *on suit of* 1922—*Liability to scaling down as "debt".*

A suit for partition instituted in 1922, was dismissed by the Trial Court but the High Court on appeal decreed it in 1933 and held that the plaintiff was entitled to mesne profits for three years prior to suit. The lower Court ascertained the mesne profits in 1935 and that was substantially affirmed by the High Court on 1—3—1939. On an application to scale down the debt as decreed under Ss. 8 and 9 of Act IV of 1938,

Held, though the extent of the defendant's liability was actually ascertained only in 1935, still, the liability was there and hence it was a debt within the meaning of the Act and was liable to be scaled down in accordance with the provisions of the Act.

I.L.R. 1939 Mad. 776, referred to.

K. Bhashyam Iyengar and *T. R. Srinivasan* for Petitioners.

Ch. Raghava Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Wadsworth, J. Subbaramayya *v.* Pedda Subbiah.
10th December, 1940. C.R.P. No. 1551 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (ii), *Proviso* C *Explanation—Assessment on basis of capital value—Calculation of rental value—Proper procedure.*

Where the assessment on properties is on the basis of capital value, under the explanation to S. 8 (ii), Proviso C of Madras Act IV of 1938, the rental value must be calculated at 5 per cent. of the capital value. It is not open to the Court to take evidence of the actual rent paid, capitalise this on the 5 per cent. basis and hold that the capital value on which the assessment was based was not the actual figure adopted but the fictitious figure thus calculated.

K. S. Jayaram for Petitioner.

E. Venkataramana Rao for Respondent.

K.S.

Krishnaswami Ayyangar, J. Mohammed Khan *v.* John Major.
18th December, 1940. C.R.P. No. 1431 of 1938.

Provincial Small Cause Courts Act (*IX of* 1887), *S.* 17—*Oral evidence not given on oath—Judgment based on—Validity—Proper procedure.*

There is no warrant in law for a judgment in a small cause suit being based upon an oral examination of the parties whose evidence was not given on oath before the Court. S. 17 of the Provincial Small Cause Courts Act makes the provisions of the Civil Procedure Code, applicable to Small Cause Courts save in so far as it might otherwise be provided. O. 18, r. 13 of C. P. Code, contains a provision to the effect that in cases in which an appeal is not allowed—small cause suits are such cases—it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record. This procedure should be followed and an oral examination which is not permitted by law should not be resorted to.

A. Gopalacharlu for Petitioner.

K.S.

Wadsworth, J. *In re,* Veera Reddi and others (Accused).
18th December, 1940. C.R.P. No. 1939 of 1940.

Criminal Procedure Code (*V of* 1898), *Ss.* 195 *and* 476—*Scope*

One of the offences alleged was an offence under S. 193, I. P. Code, in connection with a proceeding before the District Munsif and such an offence falls under S. 195 (1) (*b*), Cr. P. Code, for which a complaint under S. 476, Cr. P. Code, is necessary. But the fact that the District Munsif had also complained that the facts established offences under other sections of the I. P. Code, to which S. 476, had no application is not a ground for cancelling the complaint which was valid and necessary so far as the offences under S. 193, I. P. Code, was concerned.

A. Narasimha Aiyar for Petitioner.

The Public Prosecutor for the Crown.

K.S.

The Chief Justice and Happell, J. Malla Reddi *v* Karuppa.
19th December, 1940. C.M.P. No. 5467 of 1940.

Madras Debt Conciliation Act (*XI of* 1936), *S.* 10—*Scope.*

On 2—6—1939 respondents (debtors) filed a petition for the settlement of their debts disclosing a debt of Rs. 1,500 due on a mortgage in favour of the petitioner and a debt of Rs. 130 due to another on a promissory note. The Board issued a notice under S. 10 (1) of the Act to the petitioner on 31—8—1939. On 11—1—1940 the petitioner filed extracts of his accounts as 'proof of debts and accounts' in compliance with the notice. One of the respondents wanted time to scrutinise the accounts and was allowed time till the 20th January, 1940. After many adjourn-

ments granted at the request of the respondent the petition was taken up on 11—5—1940 when neither the petitioner nor his advocate could be present. Thereupon the Board proceeded to declare the debt discharged under S. 10 (2) of the Act notwithstanding that the respondent had admitted that there was Rs. 1,500 due to the petitioner. In an application for a writ to quash the proceedings,

Held, that the Board had no right in these circumstances to invoke S. 10 (2) of the Act; it could only act under S. 12 if at all. But it could not say that there was no amount due to the petitioner in the face of the admission The Board should exercise the powers under S. 17 of the Act if no amicable settlement is arrived at within twelve months from the date of the application.

C. Sambasiva Rao and *C. Siva Rao* for Petitioner.

K. Srinivasa Rao for Respondents.

K S.

King and Patanjali Sastri, JJ. — Marina Ammayi *v.* Mirza Bather Beg Sahib.

19th December, 1940.

C.R.P. No. 1830 and 1831 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 8 *and* 19—*Preliminary decree for redemption in suit by agriculturist mortgagor impleading non-agriculturist purchasers of portions of hypotheca as co-plaintiffs—Scaling down decree—Discharge of decree against mortgagor by reason of* damdupat *rule—Effect on liability of non-agriculturist co-plaintiffs.*

In a suit by the mortgagors who were agriculturists, to redeem the mortgage, impleading the purchasers of portions of the hypotheca as co-plaintiffs, redemption was decreed on payment of a certain sum. When the agriculturist mortgagors got the decree scaled down more than twice the principal amount having been paid the decree stood discharged. In the circumstances,

Held, that satisfaction can be entered for the decree as a whole and the liability of the non-agriculturist co-plaintiffs is also discharged.

(1940) 2 M.L.J. 872, approved and distinguished.

G. Chandrasekara Sastri for Petitioners.

T. Satyanarayana for Respondent in C.R.P. No. 1830 of 1939.

V. Govindarajachari for Respondent in C R.P. No. 1831 of 1939.

K.S.

Lakshmana Rao, J — Ahmed Mohideen *v.* Yusuf Ali Syed.

10th January, 1941.

Cr.R.C. No 733 of 1940 and Cr. R. P. No. 692 of 1940.

Code of Criminal Procedure (V of 1898), *S.* 197—*Charge that complainant was beaten by Sub-Inspectors under the instructions of respondent (Assistant Commissioner of Police)—Previous sanction of the Governor of the Province—Necessity.*

Two Sub-Inspectors were alleged to have beaten the complainant in the police station (where he was taken after arrest) under the orders of the Assistant Commissioner In a complaint against the Assistant Commissioner,

Held, that the Assistant Commissioner gave the order if any while acting or purporting to act in the discharge of his official duty. He is not removable from his office save by or with the sanction of the Secretary of State and S. 197 enacts that no Court can take cognizance of such offence except with the previous sanction of the Governor of the Province in the exercise of his individual judgment.

V. T Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

V. L. Ethiraj for *A. S Sivakamanathan* for Respondent.

Crown Prosecutor (P. Govinda Menon) for the Crown.

K.S.

Wadsworth, J. Saraswathi Ammal *v.* Arabusa Sahib.
11th December, 1940. **C.R.P. No. 1704 of 1940.**

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 8 (1), 19 *and* 20 *—Dismissal of stay application under S.* 20 *for default—Effect on right to apply for scaling down decree under S.* 19*—Amounts realised in execution after* 1*st October*, 1937*—Appropriation by creditor—Permissibility.*

Section 20 of Act IV of 1938 does not contemplate any final decision on the question of the right of the applicant to apply under S. 19. Moreover, when the applicant allows his application under S. 20 to be dismissed for default he is clearly abandoning only his right to a stay. That abandonment may be due to many causes. For instance, the execution may have stopped for some reasons quite apart from the proceedings under the Act. In such a case there is no point in the applicant going on with his proceedings under S. 20 if time is available to him without such proceedings for preferring his application to the Court which passed the decree under S. 19. Accordingly when an agriculturist allows his application under S. 20 to be dismissed because it is not necessary, such a dismissal would not bar the substantive application under S. 19. The period of limitation prescribed in S. 20 begins to run with the grant of a stay and not when there was no grant of stay.

I.L.R. (1939), Mad. 886, referred to and explained.

Held also, that an amount realised in execution of a decree after 1st October, 1937, could not be appropriated by the decree-holder to interest accruing due before 1st October, 1937, so as to nullify the effect of S. 8 (1) of the Act.

(1940) 2 M.L.J. 547, followed.

N. Sivaramakrishna Aiyar for Petitioner.

R. Ramamurthi Aiyar for Respondent.

K.S.

The Chief Justice and Happell, J. Rajah Venkata Ramayya Appa Rao Bahadur *v.* Secretary of State for India in Council.
12th December, 1940. **L.P.A. No. 21 of 1939.**

Madras Local Boards Act (*XIV of* 1920), *Ss.* 74-*B*, 78 *and* 79 (*iii*)*—Owner of tank bed—Liability for land cess based on annual rental value of the fishery.*

Where a person is the owner of the bed of a tank the right to the fish in the tank is his. Therefore there is no escaping the conclusion that such an owner is in beneficial occupation of the land forming the bed of his tank and the levy of land cess on the value of the land, which is to be gauged by the value of the right to fish in the water lying above the land, is lawful.

(1939) A.C. 197, relied on.

Decision of *Wadsworth, J.*, in (1939) 1 M.L.J. 780, affirmed.

Y. Govindarajulu for Appellant.

The Government Pleader (*B. Sitarama Rao*) for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Arumugam Pillai *v.* Sadasivam Pillai.
13th December, 1940. **C.R.P. No. 1655 of 1940.**

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 19*—Final decree on mortgage against non-agriculturist mortgagor and agriculturist purchaser of part of the hypotheca—Scaling down—Principles.*

X the purchaser of part of the hypotheca was impleaded as a defendant in a mortgage suit which resulted in a final decree. The mortgagor was a non-agriculturist but *X* was an agriculturist. In an application by *X* for scaling down,

Held, that X the purchaser was a debtor for the purpose of Madras Act IV of 1938, and can apply under S. 19 to scale down the decree nothwithstanding the fact that the mortgagor was a non-agriculturist.

The decree can be amended so as to leave it unaffected so far as the liability of the non-agriculturist debtor is concerned.

(1940) 2 M.L.J. 872, relied on.

N. R. Sesha Aiyar for Petitioner.

K. S. Venkatarama Aiyar for Respondent.

K.S.

Wadsworth, J.
16th December, 1940.

Chithambara Aiyar *v.* Srinivasa Aiyar.
C.R.P. No. 2313 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 4 (*f*)—*Subscriber to chit fund executing security bond or mortgage to guarantee discharge of his obligation—Default—If breach of trust—S.* 4 (*f*), *if applicable.*

The liability of the subscriber who bids at a chit auction and takes the pool at a discount executing a security bond or mortgage to guarantee the discharge of his obligation by the payment of his future instalments, is a liability to which Act IV of 1938 applies. There is no question of breach of trust if he commits default and S. 4 (*f*) of the Act has no application.

C. K. Viswanatha Aiyar for Petitioner.

C. S. Swaminathan for Respondent.

K.S.

Krishnaswami Ayyangar, J.
18th December, 1940.

S. A. Ramanathan Chettiar *v.* The Official Receiver of West Tanjore.
A.A.A.O. No. 1 of 1939.

Provincial Insolvency Act (*V of* 1920), *S.* 28 (7) *and S.* 2 (d)—*Sale by debtor including his son's share after filing of creditor's petition for adjudication as insolvent—Debtor adjudged insolvent—Rights of Official Receiver to the property—"Relation back"—S.* 2 (d) *'Property' includes a Hindu father's right to sell his son's share.*

A sale deed was executed on 16th December, 1931, by the debtor including the shares of his sons, when a creditor's petition presented in November, 1929, for his adjudication was pending. In a claim by the Official Receiver to the properties on the adjudication of the creditor as insolvent on 11th April, 1932,

Held, that as under S. 28 (7) of the Provincial Insolvency Act, the title of the Official Receiver, related back to the date of the presentation of the petition, on the date of the sale not only the interest of the insolvent in the property but his right to sell the interests of his sons had vested in the receiver and therefore nothing passed to the purchaser under the sale. 'Property'' in S. 2 (*d*) includes a Hindu father's right to sell his son's shares.

A purchaser of the share of some members of a joint family has no right to possession along with the other members whose interests still remain in them. The purchaser's rights in such cases have to be worked out by a separate suit for partition.

A Swaminatha Iyer and *S. Thyagaraja Iyer* for Appellant.

S. Muthiah Mudaliar for Respondent.

K.S.

The Chief Justice and Happell, J.
19th December, 1940.

Ramabhadran *v.* Manickkam.
O.S.A. No. 39 of 1940.

Companies Act (*VII of* 1913), *Ss.* 156 *and* 158—*Voluntary liquidation—Liquidator settling list of contributories—Power to make calls—Enforcing compliance with the calls—Procedure.*

In a voluntary liquidation the liquidator settled the list of contributories and when some of them did not comply with 'calls' made upon them applied

to the High Court for an order under S. 216 of the Companies Act. Under S. 212 the liquidator has power to settle the list of contributories and where persons were rightly placed on the list of contributories, the liquidator is entitled to make calls upon them and the amounts become payable irrespective of any question of limitation.

Where the contesting contributories raise several defences, the proper procedure is to direct the liquidator to file suits and not to pass an order under S. 216 of the Companies Act.

S. Parthasarathi and *V. K. Tiruvenkatachari* for Appellant.

V. Ramaswami Aiyar, S. Nagaraja Aiyar, A. K. Sriraman and N. G. Krishna Aiyangar for Respondents.

K.S.

Wadsworth, J. Subba Reddi *v.* Venkatappa Reddi.
19th December, 1940.

C.R.P. No. 1956 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 4 (h)—*Promissory note standing in favour of men—Evidence to show that debt is really owed to a woman to invoke S.* 4 (h)—*Not permissible.*

A decree was obtained by the holder of a promissory note which at least since 1935 stood in the name of men.

Held, that in such circumstances it is not permissible for the decree-holder to adduce evidence that the debt is really owed to a woman in order to invoke S. 4 (*h*) of Act IV of 1938. The liability of the judgment-debtor is to the decree-holder and to no one else, though the decree-holder may himself be liable to pay the realisation to a woman.

P Chandra Reddi and *R. Ramalinga Reddi* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Krishnaswami Ayyangar, J. Venkatasubbiah Chowdari *v.*
19th December, 1940. Venkatasubbiah and others.

A.A.A.O. Nos. 101 and 102 of 1939.

Execution—Decree against A, *the manager of a joint family personally and his brother* B *to the extent of the assets of joint family—Adjudication of* B *as insolvent pending execution proceedings against him—Subsequent application to proceed against his sons shares after twelve years from decree —If barred by S.* 48, *C. P. Code—Orders in execution proceedings against* B*—How far binding on* B*'s sons.*

A decree was passed on 30—11—1918 against the maker of a promissory note *A* who was the manager of a joint family and his brother *B*. Against *A* the decree was personal and it directed that the decretal amount should also be recoverable from the assets of the joint family of *A* and *B*. A number of execution applications were taken out by the decree-holder before 1930, all of which ended in nothing being recovered. On 29th November, 1930, the last day of the period of twelve years limited by S. 48, C. P. Code, the decree-holder filed an execution petition for the attachment of some specified immovable properties of the joint family. When the petition was pending *A* was on his own petition adjudged an insolvent on 18—7—1932 and on 26—9—1932 the execution petition was dismissed. On 1st November, 1933, the order of adjudication was annulled and on 28—4—1934 a fresh execution petition was filed by a person who had meanwhile obtained an assignment of the decree. Pending this execution petition *B* was adjudicated an insolvent on his own petition, and the assignee decree-holder obtained permission of the Insolvency Court to proceed against the shares of the sons of *B*, the insolvent The assignee

decree-holder thereupon filed an application for the sale of the interest of the sons.

Held, that *B* effectively represented his sons in the prior execution proceeding of 10—9—1934 and the decisions thereon were binding upon the sons and as the proceeding was merely a continuation of the execution proceedings in 1930, there is no question of S. 48, C.P.Code being attracted.

Y. Suryanarayana for Appellant.

K. Krishnamurthi for Respondent.

K.S.

The Chief Justice and Happell, J
20th December, 1940.

Doraiswami Naicken *v.* Periakaruppan Chettiar.
L.P.A. No. 10 of 1940.

Limitation Act (*IX of* 1908), *S.* 20 (2)—*Applicability—Mortgagee going into possession under an invalid contract of sale after preliminary decree—Receipt of rents and profits while in possession—If saves limitation for application for a final decree.*

The plaintiff who had a valid mortgage went into possession of the mortgaged properties under an invalid contract of sale.

Held, that the fact that his sale proved to be invalid could not vitiate his title as mortgagee and the rents and profits which he received must in the circumstances be deemed to have been received by him as mortgagee. And such receipt of rents by the mortgagee while in possession extends the time for the filing of an application for a final decree.

Case-law discussed.

Decision of *Patanjali Sastri*, *J.*, in (1940) 1 M.L.J. 134, reversed.

K. Rajah Aiyar for Appellant.

S. Ramachandra Aiyar for Respondent.

K.S.

Mockett and Wadsworth, JJ.
10*th January*, 1941.

Ramasubba Iyer *v* Ayyalu Naidu.
C.R.P. No. 1820 of 1940.

Court-Fees Act (*VII of* 1870), *S.* 7, *Cl.* (*iv*) (*a*)—*Suit by worshippers for a declaration that a decree obtained against the temple was invalid and not binding—Suit valuation and court-fee payable*

A grocer obtained a decree against a temple and it was alleged that it was in collusion with the trustee. Three worshippers filed a suit praying *inter alia* for a declaration that the earlier decree was not binding on the temple. On the question of the proper court-fee payable in respect of the relief,

Held, per *Mockett, J.*, the suit is different from reversionary suits such as the one in 45 L.W. 380 where a reversioner asks that a decree against the widow should be declared invalid. Where persons come forward and virtually say that, as representing a particular entity (and a temple is an example of an entity that must be represented) they claim to have a decree against it cancelled, court-fee should be paid under S. 7, Cl. (*iv*) (*a*) of the Court-Fees Act.

Per *Wadsworth, J.*—The plaintiffs really sue only in the right of the temple and its trustees and they should not be permitted to escape from the natural consequences of their suit by arraying the temple and its trustees amongst the defendants instead of their being co-plaintiffs as in theory they ought to have been.

V. N. Venkatavaradachariar for Petitioner.

The Government Pleader (B. Sitarama Rao), K. S. Desikan and *S. Sankara Aiyar* for Respondent.

K. S.

Lakshmana Rao, J.
17th January, 1941.

Sharma *v.* Dharma Rao.
Cr.R.C. No. 856 of 1940 and
Cr.R.P. No. 809 of 1940.

Copyright Act (III of 1914), Ss 7 and 8—Complaint disclosing an offence under—Dismissal on the ground that dispute is of civil nature—Propriety.

Where the complaint discloses an offence under Ss. 7 and 8 of the Indian Copyright Act its dismissal on the ground that the dispute is of a civil nature cannot be sustained

T. R. Venkataraman for Petitioner

P. Srinivasa Aiyangar for Respondent.

Crown Prosecutor for the Crown

K.S.

King, J.
17th January, 1941

Middle School, Sathur *v.* Meenakshisundaram Aiyar.
C.R.P. No. 1688 of 1938

Master and servant—Dismissal of a teacher without notice—Madras Educational Rules, R. 154—Three months' notice—Necessity for

A teacher was dismissed from service by the management of an aided school, without any notice, for alleged misconduct which was not, however, enquired into by the Director of Public Instruction. In a suit by the teacher claiming three months' salary in lieu of notice,

Held, that under the Madras Educational Rules a teacher is entitled to three months' notice or to payment of three months' salary in lieu of notice; and even if there is no written contract between the teacher and the management, the teacher is entitled to such notice unless he is guilty of such misconduct as may be considered by the Director of Public Instruction to warrant cancellation or suspension of his certificate under r. 154; and the Director of Public Instruction alone is the ultimate authority on the question of misconduct.

S. Narayana Aiyangar for Petitioner.

R. Desikan, for Respondent

K S

King and Patanjali Sastri, JJ.
23rd January, 1941.

Arunachalam Pillai *v.* Sithirama Naidu
A S No. 47 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Mortgage debt scaled down in favour of agriculturist mortgagor—Effect on liability of the property in the hands of non-agriculturist court-auction-purchaser in execution of a money decree against mortgagor—Relinquishment by mortgagee of right to personal decree against mortgagor—Effect on liability of the purchaser.

In a suit to enforce a mortgage against the agriculturist mortgagor and a non-agriculturist court-auction-purchaser of the mortgaged property in execution of a money-decree, the debt was scaled down on the application of the mortgagor. Thereupon the mortgagee sought to recover the full amount due on the mortgage from the non-agriculturist purchaser offering to relinquish his right to a personal decree against the mortgagor

Held, the properties are liable only as security for the debt due by the mortgagor and if as a result of the Act there is a statutory discharge or reduction of the debt, the properties cannot be proceeded against for anything more than the scaled down amount of the debt. The purchaser in court-auction took the property subject to the burden of the mortgage and if the burden is by reason of the provisions of S. 8 of Act IV of 1938 reduced without payment, the purchase proves to that extent an advantageous one and there is nothing in the Act to deprive the purchaser of the fruits of his lucky purchase even though he is not an agriculturist. He gets the benefit of the scaling down not because the provisions of the Act apply to him, for obviously they do not, but because such benefit is a necessary incident of his purchase under the general law and the Act does not deprive him of it. The relinquishment by the mortgagee of this right to a personal decree against the mortgagor after Act IV of 1938 had come into force and the mortgagor had in fact applied for relief under it, cannot affect the position which arises under the Act with reference to a date long prior to such relinquishment. What the consequence would be if the mortgagee had agreed to exonerate the mortgagor from all personal liability before the Act came into force was left open.

(1940) 2 M.L.J. 872, distinguished. I.L.R. 1939 Mad. 218= (1938) 2 M L.J. 1068, referred to.

K. V. Sesha Aiyangar and *R. Subramanta Aiyar* for Appellant.

T. M. Krishnaswami Aiyar and *K Venkateswaran* for Respondents.

K.S.

Lakshmana Rao, J.
23rd January, 1941.

Public Prosecutor *v.* Hall & Company, Coimbatore.

Crl. App. No. 697 of 1940.

Companies Act (VII of 1913), *S.* 282-B (5)—*Security deposit by employee of company not deposited in scheduled bank—Liability of managing agents and secretaries to conviction under S.* 282-B (5).

Where the security deposit of an employee of a company is not deposited in a scheduled bank by the employer company as required by S. 281-B (1) of the Companies Act the managing agents and secretaries of the company are guilty and liable to a conviction for an offence under S. 282-B (5) of the Indian Companies Act.

A. S. Sivakaminathan for Public Prosecutor.

Respondent not represented

K.S.

Happell, J
24th January, 1941.

Rangasami Nadar *v.* Minor Pichamani by guardian Chinnu Nadar.

C.R.P. No. 1511 of 1938.

Civil Procedure Code (V of 1908), *O.* 41, *r.* 10—*Appeal — Order directing security to be furnished within a specified time—Security tendered in time—Rejection of appeal before testing—Propriety.*

Where security is ordered to be furnished within a particular time, it is a compliance with the order if it is tendered within the time; and the appeal cannot be rejected unless the security is tested and found insufficient, even though the testing is after the time fixed for furnishing it. The testing of the security itself need not be within the time

Decision of *Jackson, J.*, in 52 M.L.J. (Short Notes) 53, relied on.

R. Desikan for Petitioner.

P N. Appuswami Aiyar for Respondent.

K.S.

Wadsworth, J. Subbiah Nadar v. Thangiah Nadar.
4th December, 1940. C.R.P. Nos. 979 and 980 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 23—*"Within ninety days of the commencement of the Act"—Interpretation—Sale to be set aside as a whole.*

The words 'within ninety days of the commencement of this Act' in S. 23 would ordinarily indicate 'within a period of ninety days after the date on which the Act commences'. The difference in the phraseology in S. 23 from that used in S. 20 is not sufficient to justify the Court in interpreting the above words as being intended to mean 'within 89 days after the commencement of the Act'.

The words "may apply to the Court within ninety days" lay down a period of limitation within which the application may be presented and in computing that period if the last date falls on a day when the Court is closed such day can be excluded. S. 23 is applicable even when the sale in execution has been followed by delivery.

(1940) 2 M.L.J. 709, relied on.

An application by one judgment-debtor can enure to the benefit of the other judgment-debtors also. The whole sale has to be set aside and proceedings under S. 19, will result in benefit to the several judgment-debtors according as they are agriculturists or not.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Petitioner.

J. S. Vedamanikkam for Respondent.

K.S.

Wadsworth, J. Ponnusami Goundan v. Kanniappa Goundan.
11th December, 1940. C.R.P. No. 1746 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 19—*Application by non-agriculturist judgment-debtor—Competency—Agriculturist debtor's rights—If can be decided in the application.*

There is no jurisdiction under S. 19 to amend a decree on an application by a judgment-debtor who is admittedly a non-agriculturist. Whether or not the non-agriculturist judgment-debtor would be entitled to the benefits of S. 14 of the Act, if and when the agriculturist judgment-debtors get the decree re-opened under S. 19, is a matter which cannot be decided in proceedings under Act, IV of 1938, started by a non-agriculturist judgment-debtor.

T. S. Vaithianatha Aiyar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Venkataramana Rao and Horwill, JJ. Venkatasabapathy Chetty v.
7th January, 1941. Unnamalai Ammal.
A.A.O. No. 217 of 1938.

Practice—Costs—Beneficiary propounding will and applying for probate—Contest by widow—Putting plaintiff to proof—Costs of beneficiary proving the will—Right to—Practice—Duty of Probate Court to grant letters of administration with the will annexed to proper person, where no executor is appointed under will.

Where a beneficiary applies for probate of a will and on the application being contested he was put to proof of the will,

Held, that the usual practice in cases where a plaintiff seeks to establish a will under which he has been given a legacy and the plaintiff is merely put to proof of it, is to award costs to both parties from and out of the estate.

In cases where no executor has been appointed under the will it is the duty of the Probate Court on the will being established to direct the issue of

letters of administration with will annexed to such persons as are under the Succession Act competent to administer the estate thus avoiding further expenses and litigation.

T. K. Sundararaman for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Venkataramana Rao and Horwill, JJ. *10th January, 1941.* Mallayyamma *v.* Province of Madras represented by the Collector of Vizagapatam. A.A.O. No. 288 of 1939.

Civil Procedure Code (V of 1908), O. 33, r. 10—Abatement of suit by death of pauper plaintiff—Absence of provision for payment of Court-fees and costs of Government from estate of deceased plaintiff—Lacuna *pointed out.*

Where the suit abates by reason of the death of a pauper plaintiff, on the question as to the liability to pay the Court-fees due to the Government O. 33, rr. 10 and 11 do not directly cover the case and there is a *lacuna*. It is desirable for the legislature to take steps to amend the Civil Procedure Code, to cure such *lacuna*.

P. Somasundaram for Appellant.

The Government Pleader for Government.

K.S.

Burn, O.C.J. and Happell, J. *15th January, 1941.* Periyathayammal *v.* Gunniah Naidu. Crl.M.P. No. 1496 of 1940.

Contempt of Court—Suit for ejectment of sole defendant and for delivery of possession—Receiver appointed while suit was pending, at the instance of plaintiffs for the purpose of harvesting the crops on the land and for realising the rents and profits of the land in suit—Stranger claiming that he was entitled to and was in possession—Order of Court confirming receiver's possession—Stranger circulating notice to public asserting his right and warning public from taking lease—Contempt.

Plaintiffs filed a suit for the ejectment of a sole defendant and for delivery of possession of some property. While the suit was pending, the plaintiffs applied for the appointment of a Receiver for the purpose of harvesting the crops on the land and for realising the rents and profits due from the tenants who were cultivating the land. The receiver took possession with police help. Subsequently an application was put in by the plaintiffs for an order directing the receiver to lease out the plaint land in order to prevent loss to them. *X* a third party also filed another application in which he claimed that the plaintiffs in the suit were not entitled to oust them from the property for the reason that *X* was both entitled to and in possession of it.* The District Judge passed an order saying that he saw no justification for disturbing the possession of the receiver since *X* came to the Court very late and the receiver had done most of the work entrusted to him. He consequently directed the receiver to sell the produce in the open market. It was alleged that *X* was orally asserting that the property belonged to him and he would not allow the crop growing on the land to be removed and also issued a notice informing the public that they should not purchase the properties described in it or the produce standing on them or take them on lease in contravention of the rights of *X* and warning the public that if they purchased the property in auction or entered up on it without *X's* permission they would themselves be responsible for any trouble that resulted. In an application to commit *X* for contempt of Court,

Held, that *X* was guilty of contempt of Court in circulating the notice. (In view however of the mitigating circumstances the apology tendered by *X* was accepted and *X* was discharged but directed to pay the petitioners' costs.)

K. Rajah Aiyar and *R. Rangachari* for Petitioners.

Ch. Raghava Rao for Respondents.

K.S.

Pandrang Row and Somayya, JJ. 29*th January*, 1941.

M. & S. M. Railway Co. *v.* Municipal Council, Bezwada.
A.S. Nos. 240 and 297 of 1937.

Madras District Municipalities Act (*V of* 1920), *Ss.* 81 *and* 354—*Vacant lands and buildings in possession of railway company—Assessment of property-tax—Committee formed to fix capital value—Validity—Annual value—Computation based on capital value.*

In pursuance of a notification issued by the Government of India under S. 135 of the Indian Railways Act, authorising Municipalities to levy property-tax on railway lands and buildings in accordance with S. 81 of the District Municipalities Act, the Municipal Council of Bezwada sought to levy property-tax on the appellant railway company. At the instance of the company a committee was constituted to fix the capital value of the lands and buildings and on the basis of the value so fixed the chairman of the municipality levied and collected a lakh of rupees as tax for the quinquennium from the railway company. In a suit questioning the legality of the procedure and the assessment,

Held, that (*i*) the railway company had to show that there was no substantial compliance with the District Municipalities Act; (*ii*) when there was no basis for fixing the annual value of vacant lands, it was permissible on the analogy of English decisions interpreting rating statutes, (*e.g.*) to adopt the capital value basis for determining the annual value; (*iii*) though there was no statutory provision for a committee to fix the annual value, the company itself having asked for it, the levy of the tax by the chairman adopting the opinion of the committee was not illegal; and (*iv*) there was substantial compliance with the provisions of the Act in levying the tax.

T. R. Venkatarama Sastri instructed by *Messrs. King and Partridge*, solicitors for Appellant.

Sir Alladi Krishnaswami Aiyar and *P. Satyanarayana Rao* for Respondent.

K.S.

Mockett, J. 30*th January*, 1941.

Velayudham Pillai *v.* Subramania Pillai.
C.R.P. No. 1696 of 1940.

Civil Procedure Code (*V of* 1908), *O.* 11, *r.* 14—*Certified copies of income-tax returns—Whether a party can be compelled to obtain and produce at the instance of the opposite party—Income-tax Act, S.* 54—*Scope and effect.*

A plaintiff applied to the Court under O. 11, r. 14, Civil Procedure Code for an order directing the defendant to obtain certified copies of the income-tax returns of the defendant and to produce them, alleging that they would be material to prove the plaintiff's case.

Held, that the defendant cannot be compelled to produce documents not yet in existence as they could not be said to be in his 'possession or power'.

Held, further, that such discretionary orders under O. 11, r. 14 could not be passed except under very special circumstances and that in view of S. 54 of the Income-tax Act, such documents must be treated as confiden-

tial and the Court should not compel the assessee to apply for copies and produce them.

K. S. Desikan and *K. Raman* for Petitioner.

S. Panchapakesa Sastri and *P. S. Ramachandran* for Respondent.

K.S.

King, J.
31st January, 1941.

Muni Reddi *v.* Muni Reddi.
C.M.S.A. Nos. 116 and 118 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 18—Creditors representing more than fifty per cent. of the debts accepting settlement—Two decree-holder-creditors not consenting—Registration of agreement with consenting creditors earmarking the debtor's assets to those debts and issue of certificate by the Board that a fair offer had been rejected by the two decree-holders—Effect on executability of the decrees.

A debtor applied for conciliation of his debts. There were ten creditors. Eight of them to whom more than fifty per cent. of the debts was due, agreed to a settlement. The remaining two creditors who had already obtained decrees refused to consent to the settlement. After due registration of the settlement the Board issued a certificate that a fair offer which was made had been rejected by the decree-holders. In an application for execution of the decrees it was contended that the certificate of the Board must be deemed to be a "decree of the Court" and that the assets set apart in the agreement cannot be proceeded against.

Held, that there was nothing in S. 18 about the position of creditors who have already obtained decrees and there was no obstacle to the execution of the decrees.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Appellants.

B. C. Seshachala Aiyar, P. S. Ramachandran and *S. Venkatachalam* for Respondents.

K.S.

Venkataramana Rao, J.
3rd February, 1941.

Nallathambi Paradesi *v.* Madras Hindu Religious Endowments Board and others.
C.R.P. No. 1472 of 1938.

*Madras Hindu Religious Endowments Act (II of 1927). S. 84 (2) Board deciding a temple to be 'excepted temple' on the application of trustee —Worshipper who was allowed to contest the application—*Locus standi *to apply under S. 84 (2) of the Endowments Act, to have the order set aside.*

A trustee of a temple applied to the Endowments Board to have the temple declared an excepted temple. A worshipper opposed the application. The Board declared the temple to be an excepted one. In an application by the worshipper to the District Court under S. 84 (2) of the Endowments Act, to set aside the order of the Board an objection was taken to the *locus standi* of the worshipper to apply, on the ground that he was not a "person aggrieved or affected" by the order.

Held, that the worshipper having been allowed to contest the application before the Board, he must be deemed to be a person affected by the decision which was adverse to him and he had therefore a right to apply under S. 84 (2) of the Act, to have the order of the Board set aside.

T. A. Ramaswami Reddi for Petitioner.

V. V. Chowdary, M. Seshachalapathi and *T. R. Srinivasan* for Respondents.

K.S.

Happell, J.
6th January, 1941.

Raja Venkatanarasimha *v.* Polina Rattamma.
C.R.P. No. 1543 of 1938.

Madras Estates Land Act (I of 1908), S. 3 (10)—Accretion to village in a lanka in a river leased out to tenants—Whether jirayati or private land—Suit for rent—Forum.

Land which is an accretion to a village situated in a lanka in a river and leased out to tenants is not private land but *jirayati* land; and a suit for recovery of rent due from the lessee of such lands must be filed in the Revenue Court and not in the Civil Court.

P.V. Rajamannar and *K. Subba Rao* for Petitioner.

V.V Chowdary and *A Venkataswami* for Respondent.

K.S

Burn, O.C.J., and Happell, J.
8th January, 1941

Saiyid Muhammad Sahib *v.* Subramaniyan Chettiar.
A.S. No. 65 of 1937.

Civil Procedure Code (V of 1908), S. 35 (2)—Plaintiff failing to make out his case—Right of defendant to costs—Written statement making allegations of more extensive nature than defendant able to establish—Effect on right to costs.

The onus of making out his case always lies upon the plaintiff in a claim suit and if he fails to make out his case his suit has to be dismissed and the fact that the defendant in his written statement has made allegations of a more extensive nature than he was able to establish is not a sufficient reason for disallowing the successful defendant's costs.

B. Sitarama Rao and *T. K. Sundararaman* for Appellant.

K.S. Venkatarama Aiyar for Respondent.

K.S.

Abdur Rahman, J
17th January, 1941

Kuppuswami Naidu *v.* Kuppuswami Naidu and others.
S.A. No. 92 of 1938.

Adverse possession—Suit for setting aside a sale and for possession—Plaintiff away from India undergoing imprisonment in Andamans at date of sale—If entitled to exemption from bar of limitation for period when he was not in India.

While plaintiff was undergoing imprisonment in the Andamans on a sentence of transportation for life his step-mother alienated some properties in April, 1915. The plaintiff came back in 1926 and brought a suit in 1934 for setting aside the sale and for recovery of possession. It was contended on behalf of the plaintiff that adverse possession should not be held to start against him when he was not in India especially when his absence was not voluntary but enforced.

Held, that it is no ground of exemption under the Limitation Act. Whether the plaintiff was voluntarily out of India or involuntarily so is immaterial. The possession of the defendant need not be known to the plaintiff to be adverse as long as it is open and capable of being known by the parties who are interested in the property. 66 M.L.J. 184 (P.C.), followed.

C.R. Rajagopalachari for Appellants.

N. Gopala Menon and *V.M. Ramaswami Mudaliar* for Respondents.

K.S.

N. R. C.

Happell, J.
20*th January*, 1941.

Manikyam v. Manikyamma.
C.R.P. No. 9 of 1939.

Civil Procedure Code (*V of* 1908), *S.* 60, *Cl.* (*b*)—*"Musical instruments" belonging to judgment-debtor—If exempt from attachment—"Artisan" if includes "artists".*

A musician is not employed in an industrial art and a wider meaning cannot be attached to the word "artisan" to include a musician. Musical instruments are not "tools of an artisan" within the meaning of S 60 (*b*), Civil Procedure Code and are not exempt from attachment.

P.V. Vallabhacharyulu for Petitioner

T. Satyanarayana for Respondent.

K.S.

Wadsworth, J.
22*nd January*, 1941.

Suranna v Chendramma.
S.A. No. 102 of 1938.

Easement—Private right of way—If can be acquired by person exercising his right as a member of the public.

An individual who is exercising his right of way as a member of the public cannot at the same time have the necessary *animus* to establish from such acts of user the acquisition of a private right of easement.

V. Suryanarayana for Appellant

M. Appa Rao for Respondents.

K.S.

Abdur Rahman, J.
24*th January*, 1941

Kachi Muhaidin Tharaganar v. Sainambu Ammal.
S.A. No. 94 of 1938.

Muhammedan Law—Shafei sect—Guardianship and custody—Right of mother to custody of daughters—Right to maintenance from father after attaining puberty.

Among the Shafeis the mother is competent to retain her daughters' custody in spite of their having attained puberty up to the time that they were actually married. But this has no bearing on their right to maintenance. If the father has any right to the custody of his children he is entitled to enforce that right but the fact that he has not done so or that his children are residing elsewhere does not deprive them of their right to recover maintenance from their father. The father even if entitled to custody of his daughters after puberty is liable for their maintenance up to the time they are married. The father being the legal guardian is also beside the point. Authorities reviewed.

T.P. Gopalakrishna Aiyar for Appellant

N.R. Sesha Aiyar for Respondent.

K.S.

Wadsworth, J.
24*th January*, 1941.

Muthukrishna Aiyar v. Savithri Ammal.
A.A.A.O. No. 200 of 1939.

Civil Procedure Code (*V of* 1908), *S.* 47—*Objection to execution raised by party or his representative setting up paramount title—Matter relates to execution of decree and decision is appealable.*

When an objection is put forward to execution by a party or his representative on the ground that he has some paramount right which prevents the execution of the decree against him, that is, an objection which he purports to put forward under S. 47, C.P.Code and the matter does relate to

the execution of the decree. Whether the objection is good or not will depend on various considerations, but the validity of the objection will not govern the procedure by which it is to be decided. If it is decided by the procedure under S. 47 a right of appeal will result from the decision. A.I.R. 1927 Mad. 481 and 71 M.L.J. 511, discussed.

M. Subbaraya Aiyar for Appellant.

T.L. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J.
24th January, 1941.

Ponnuswami Udayan *v.* Chidambara Udayan.
S.A. No. 7 of 1941.

Practice—Second Appeal—Question of fact—Reversal of finding of fact of trial Court by lower appellate Court—If can be interfered with in second appeal.

It is not the province of the second appellate Court to decide whether on a pure question of fact, the lower appellate Court is right or the trial Court is right, because even assuming that the lower appellate Court was not right, there is no right in the High Court to say so and indeed no second appeal is competent when the only question that is raised therein is a question of fact. Though the interests involved may be considerable it does not cease to be a question of fact.

V.T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Appellant.

Respondent not represented.

K.S.

Mockett, J.
3rd February, 1941.

Province of Madras *v.* Kamaraja Pandiya Naicker.
C.R.P. No. 356 of 1940.

Limitation Act (IX of 1908), S. 5—Appeal involving a principle of some importance—If sufficient ground for excusing delay in filing—Costs ordered in excusing delay—Receipt "without prejudice"—If bar to revision petition against order excusing delay.

It is not open to the judge to excuse the delay in filing an appeal merely on the ground that the appeal involves a principle of some importance and injustice might be done if the right of appeal is denied because of the delay.

Where after an order excusing delay in filing the appeal on condition that the appellant paid the costs of the respondent, the mere receipt by the respondent of the costs "without prejudice" does not bar a petition to the High Court to revise the order excusing the delay. 58 M.L.J. 137, relied on.

The Government Pleader B. Sitarama Rao for Petitioner.

V. Govindarajachari for Respondent.

K.S.

Somayya, J.
4th February, 1941.

Kesavalu *v.* Venkatarama Chettiar and another.
C.R.P. No. 567 of 1939.

Civil Procedure Code (V of 1908), S. 35 and O. 7, r. 10—Returning plaint for presentation to proper Court—No jurisdiction to make payment of costs to defendants a condition precedent to the presentation in proper Court.

When passing an order under O. 7, r. 10, C.P.Code, returning a plaint for presentation to the proper Court, the Court has no jurisdiction to im-

pose a condition that the plaintiff should before representing the plaint, pay the costs of the defendant as a condition precedent. Though S. 35, C. P. Code states that the fact that the Court had no jurisdiction to try a suit should be no bar to the exercise of the power to order costs, there is no power to make payment of costs a condition precedent to the filing of the suit in the proper Court.

K.S. Rajagopala Aiyangar and *K.S. Ramaratnam* for Petitioner.

N. Rajagopala Aiyangar for Respondent.

K.S.

Venkataramana Rao and Abdur Rahman, JJ.
4th February, 1941.

Appaswami Palanoor *v.* The Hongkong-Shanghai Banking Corporation, Ltd., and others.
C.M.A. No. 391 of 1938.

Practice—Execution—Attachment before judgment—If can be deemed to have been abandoned by mere proceeding against other properties.

R filed a suit to recover a sum of money and obtained an attachment before judgment of the debtor's property. After the suit was decreed the debtor mortgaged the attached property to *X* who subsequently without impleading *R*, sued on the mortgage, obtained a decree, in execution whereof he purchased the hypotheca. *R* subsequently assigned his decree to *A* who in pursuance of the attachment before judgment brought the property to sale and purchased it himself. *A* having dispossessed, *X*, *X* took out an application for restoration of possession on the ground that the attachment should be deemed to have been abandoned by reason of the decree-holder's conduct in taking execution proceedings against other properties of the judgment-debtor.

Held, that the mere taking out of execution proceedings in respect of other properties of the judgment-debtor is not an indication of abandonment of the earlier attachment by the decree-holder. Under law apart from the question of estoppel there can be no question of abandonment. An attachment would come to an end only by one of the methods prescribed under the Civil Procedure Code such as payment to the decree-holder under O. 21, r. 55 or dismissal of the execution application under r. 57.

K. V. Krishnaswami Aiyar and *T. L. Venkatarama Aiyar* for Appellant.

Sir A. Krishnaswami Aiyar, K. Subramaniam and *C. Krishnaswami Aiyar* instructed by *King* and *Partridge* for Respondents.

K.S.

Krishnaswami Aiyangar, J.
4th February, 1941.

Re: E.V.D'Silva, an insolvent.
Application No. 336 of 1940.
I.P. No. 217 of 1940.

Presidency Towns Insolvency Act (*III of* 1909), *Ss.* 2 (e), 58 (3) *and* 60 (1)—*Insolvency of public servant—Salary below the attachable limit under Civil Procedure Code—Order for allocation out of salary—Validity*

On the application of the Official Assignee the insolvent, a clerk in the Public Works department workshop drawing a salary of Rs. 60 per month, was ordered by the Master of the High Court to pay an allocation of Rs. 4 a month out of his salary. On appeal,

Held, (*i*) S. 60 (1) of the Act limits the portion of the salary to be paid to the Official Assignee to the attachable income of the insolvent;

(*ii*) An order for appropriation of salary can be and is always only under S. 60 of the Presidency Towns Insolvency Act;

(*iii*) The salary accrued due to the insolvent in the hands of his employer did not fall within the definition of "property" in S. 2 (*e*) of the Act, as the insolvent has no disposing power over it;

(*iv*) Though, theoretically, it would cease to be "salary" as soon as it was paid into the insolvent's hands, there was no power to issue an anticipatory process to restrain the insolvent from dealing with his salary after it was received;

(*v*) Prospective salary is not property vested in the Official Assignee and a prospective order cannot be made impounding the future personal earnings of an insolvent and directing appropriation of the same without regard to the attachable limit, fixed by S. 60, C.P.Code and S. 60 (1) of the Presidency Towns Insolvency Act on public grounds;

(*vi*) S. 33 (3) does not apply, as it refers to property that has vested and only requires to be realised;

(*vii*) The practice of the Court in ordering allocations even where the Insolvent's salary is below the attachable limit cannot be followed as it is against the provisions of the Act;

(*viii*) Whether salary or other income vests or not in the Official Assignee, the Court can make an order for appropriation if empowered under S. 60.

Corresponding provisions of the English Bankruptcy Act referred to.

S. J. S. Fernandes for the Insolvent.

The Official Assignee (V. Thiyagaraja Aiyar) in person.

K.S.

Pandrang Row and Somayya, JJ.
5th February, 1941.

Swayampakula Subbaramayya *v.* Swayampakula Venkatasubbamma.
Appeal No. 33 of 1939.

Hindu Law—Marriage in the anuloma form, if valid.

The plaintiffs who were *Kapus* (Sudras) by caste, alleging that they were respectively the widow, daughter and son of one *J*, a Brahmin, brought a suit for maintenance against the Brahmin sons and widow of the said *J*. The lower Court found in favour of the *factum* as well as the validity of the marriage of the first plaintiff with *J* and granted a decree for maintenance to all the plaintiffs. On appeal,

Held, that such a marriage was invalid, as anuloma marriages are prohibited for the present age and have become obsolete.

Texts and case-law fully discussed. Accounts of foreign travellers considered. Mayne's Hindu Law, 10th Edition, Ss. 123-127 referred to. I.L.R. 52 Mad. 160, disapproved. I.L.R. 28 All. 458 and 14 Bom. L R. 547, followed. I.L.R. 46 Bom. 871 and I. L. R. 55 Bom. 1, dissented from.

The Advocate-General (Sir A. Krishnaswami Aiyar), M.S. Ramachandra Rao and *D.R. Krishna Rao* for Appellants.

P.V. Rajamannar and *K. Subba Rao* for Respondents.

K.S.

Abdur Rahman, J.
5th February, 1941.

The Vedarayaswami Devasthanam represented by its Managing Trustee, Sri La Sri Subramania Pandarasannadhi *v.* Pichu Aiyar and others.
S.A. Nos. 1008 to 1035 of 1940.

Court Fees Act (VII of 1870), S. 7 (11) (a)—Art. II 17 (18) and S. 12 (2)—Madras Estates Land Act (I of 1908), S. 56—Suits under — Court-fee payable on appeals and second appeals—Excess court-fee paid in

the lower Court due to a bona fide *mistake—Power of the High Court to order refund.*

Though plaints in suits under S. 56 of the Estates Land Act, which are filed in the Revenue Courts are exempted from paying any court-fee, on appeals therefrom to the District Court and the High Court, court-fee is payable under S. 7 (11) (*a*) and not under Art. II, 17 (18) of the Court-Fees Act.

When the appeals come before the High Court for consideration under S. 12 (2) of the Court-Fees Act,—the High Court can exercise its inherent power to direct refund of the excess court-fee paid in the lower Court due to a *bona fide* mistake.

A V. Viswanatha Sastri for *R. Sundaralingam*, for Appellant.

T. Krishna Rao for Government Pleader.

K.S.

Mockett, J.
10th February, 1941.

S. Kuppusami Chettiar *v.* Subbaraya Chettiar and others.

C.M.A. No. 240 of 1940.

Practice—Sanction to prosecute for offences committed in the course of proceedings before the Court—Considerations.

In sanctioning a prosecution for offences committed in the course of proceedings before the Court, the Court should consider not only whether there was a *prima facie* case but also whether it was not against public interest to allow the criminal proceedings.

K. S. Jayarama Aiyar and *G. Gopalaswami* for appellant

K.V. Ramachandra Aiyar for Respondent

The Public Prosecutor for the Crown.

K.S.

The Chief Justice and Happell, J
10th February, 1941.

C. D. Parthasarathy *v.* Madras Publishing House, Ltd., and two others.

O.S.A. No. 59 of 1940

Companies Act (*VII of* 1913), *S.* 230 (1), *sub-S.* 2*—Liquidation — Preferential claim for salary of employee—Mortgage of whole of the immovable and movable effects of company and floating charge over book debts—Effect.*

A mortgage of the whole of the immovable and movable effects of a company including a floating charge over the book debts is a debenture and an employee is entitled to priority by virtue of S. 230 (1) 2 of the Act over the assets of the company subject to the floating charge on a winding up, in respect of arrears of salary to the extent of Rs. 1,000. (1929) 1 Ch. 498, followed.

P. S. Narayanaswami Aiyar for Apppellant.

T.T. Vijayaraghavan for the *Official Liquidator*.

C R. Rajagopalachariar for the debenture-holder Respondent.

S.V. Shenoy for petitioning creditor.

K.S.

Wadsworth, J.
10th February, 1941.

Venkatakrishna Rao *v.* Nammayya and others.

C.R.P. No. 677 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 28*—Applicability to decrees under S.* 145 *of the Madras Estates Land Act—Transferee of holding not impleaded in suit for rent—If a judgment-debtor, entitled to apply under S.* 28 *of Act IV of* 1938.

A got a money decree against *X* and *Y* who were registered pattadars and in execution of that decree purchased the holding in court auction on 26—11—1934. In the following year he got possession through Court and applied to the registered proprietor for recognition of the transfer. Thereafter the proprietor received rents from *A* though there was no formal order recognising the transfer. In 1937 the registered proprietor filed a suit for rent of the holding, impleading only *X* and *Y* the former pattadars, got a decree and assigned it to *C* who executed the decree and brought the holding for sale and it was purchased by *B* on 25—2—1938. Thereupon *A* made a deposit for the rent due for fasli 1347 under S. 15 of Act IV of 1938 and applied for setting aside the sale.

Held, as the petitioner had formally applied for recognition of the transfer and the land-holder after such application had received payments of rent from *A*, S. 145 of the Madras Estates Land Act compels the proprietor to recognise the transfer and deprives him of the power to get a decree binding the holding without impleading the transferee. 70 M.L.J. 575, applied. The decree obtained without impleading *A* will not bind *A* and *A* cannot be regarded as a "judgment-debtor" entitled to proceed under S. 23 of Act IV of 1938.

K. Kameswara Rao for Petitioner.

V. Viyyanna for Respondent.

K.S.

Lakshmana Rao, J.
11*th February*, 1941.

Seshadri Aiyangar *v.*
Public Prosecutor.
Crl.R.C. No. 1117 of 1940 and
Crl.R.P. No. 1061 of 1940.

Indian Penal Code (XLV of 1860), *S.* 211—*Case taken on file after investigation under S.* 202, *Criminal Procedure Code—Subsequent discharge of accused—Complaint under S.* 211 *of I.P.Code—If justifiable.*

Where a case was taken on file after investigation by the police under S. 202, Criminal Procedure Code the subsequent discharge of the accused would not justify the making of a complaint under S. 211 of the Indian Penal Code.

K. Umamaheswaran for Petitioner.

A.S. Sivakaminathan for *Public Prosecutor* for the Crown.

K.S.

Wadsworth, J.
11*th February*, 1941

Perumal Naidu *v.*
Rajammal.
C.R.P. No. 75 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8 (1)—*Renewed promissory notes—Payments towards—Appropriations—Presumptions.*

Payment towards the principal of a renewed promissory note cannot be regarded as necessarily appropriated to the principal of the original note and the debtor has to prove that it was not appropriated to the interest included in the principal of the second note.

Further, open payments made in respect of a renewed note must be deemed to have been appropriated when the amount of a note in further renewal was calculated and the debtor has to prove that they were not appropriated to interest.

T.S. Ramaswami Aiyar for Petitioner.

S.S. Ramachandra Aiyar for Respondent.

K.S.

The Chief Justice and Happell, J.
12th February, 1941.

Boganathula Venkatasamy *v.* Jangiti Maduliti and others.
C.M.P. No. 6968 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 10 (2)—Creditor requesting Board to summon a document as evidence of the debt—Duty of Board to summon—Order declaring the debt discharged for failure to furnish proper statement—Propriety in the circumstances.

Where a creditor requested the Debt Conciliation Board to summon a mortgage deed in the possession of his brother as evidence of his debt but the Board did not so summon,

Held, that it was the duty of the Board to summon the document and the Board was wrong in not summoning the same and in declaring the debt discharged on the ground that the creditor did not furnish a proper statement under S. 10 (2) of the Act.

K. Krishnaswami Aiyangar and *K.S. Jayaram* for Petitioner.

S. Venkatesa Aiyangar for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
13th February, 1941.

Venkateswaralu *v.* Venkatarangam.
C.R.P. No. 239 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Scope—Partition of debt between the creditors and execution of separate promissory notes by same debtor—Effect.

A promissory note was executed on 15—5—1930 in favour of two brothers *A* and *B*. On a partition between *A* and *B's* son after *B's* death the debtor executed separate promissory notes on 29—9—1934. In an application for sealing down,

Held, that the principle laid down in *Ramasubbier* v. *Rama Aiyar*, (1941) 1 M.L.J. 89 governed the case. The principle is the same whether the new debts are equal or unequal to the old one and the debt must be sealed down on the basis of the promissory note of 1934.

N. Vasudeva Rao for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Wadsworth, J.
14th February, 1941.

Athinarayana Konar *v.* Subramania Aiyar.
S.A. No. 231 of 1939.

***Execution** — Attachment of property subject to a contract to sell — Rights.*

Though a contract to sell does not, having regard to the terms of S. 54 of the Transfer of Property Act create any interest in or charge on the property, it does give rise to an obligation which limits the right of the judgment-debtor and the attachment of the right, title and interest of the judgment-debtor is subject to any such limitation by which the judgment-debtor was bound. (1939) 2 M.L.J. 822, relied on.

No doubt if the attachment is followed by a Court sale and the purchaser at the court sale has no notice of such obligation, he will get a good title and the promisee under the private contract would be left to seek his remedy against his promisor. But where in pursuance of the contract, a registered sale deed is executed subsequent to the attachment, the sale will not be one contrary to the attachment. The absence of notice on the part of the attaching creditor as to the existence of the contract cannot give such creditor any higher rights.

G.N. Thirumalachamar and *G. Thiruvenkatachariar* for Appellants.

T.S. Venkatesa Aiyar for Respondent.

K.S.

Wadsworth, J.
18th February, 1941.

Muthusami Pillai *v.*
R.S.A.Sankara Aiyar.
C.R.P. No. 899 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Account after 1—10—1932—Settlement at the end of every year—If can be re-opened

Unless a debt falling under S. 9 relates back to a debt incurred before 1—10—1932 so as to involve the provisions of S. 8 there is nothing in S.9 to justify the re-opening of settlements or the re-appropriation of payments on the basis of a hypothetical original principal. Where the first loan was one of 1933 only, the proviso to S. 9 cannot apply and the Court cannot re-open settlements of account made by the parties at the end of each year so as to treat them as renewals of the earlier loans.

S. V. Venugopalachari for *R. Sundaralingam* for Petitioner.

T.M. Ramaswami Aiyar for Respondents.

K.S.

[F.B.]
The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
18th February, 1941.

Mir Ghulam Hussain *v.*
Aiyisha Bibi and others.
L.P.A. No. 14 of 1940.

Guardian and ward—Mother appointed guardian by Court—Sale of ward's property by guardian without sanction of Court—Sale voidable not void—Suit by assignee from ward more than three years after ward attaining majority — Barred by limitation—Practice—Letters Patent Appeal Leave — If can be confined to particular points only — Letters Patent (Madras), Cl. 15.

The mother who was appointed by the Court as guardian of her minor children *A, B* and *C* sold certain items of property belonging to them without the Court's sanction. The wards after *A* and *B* had attained majority sold their shares to *X*. *X* filed a suit more than three years after *A* had attained majority for partition and recovery of possession from the vendee of the guardian. Leave to file a Letters Patent Appeal against the decision in the second appeal was confined to the share of *A*. On the Letters Patent Appeal,

Held, (*i*) that it was not open to a judge granting leave under cl. 15 of the Letters Patent to confine the leave to one or more particular points. The whole case was open for consideration by the Bench hearing the Letters Patent Appeal;

(*ii*) that the alienation by the mother without the sanction of the Court was only voidable and not void and the suit as regards the share of the ward who had attained majority more than three years prior to the suit was barred by limitation.

Decision of *Ramesam* and *Cornish, JJ.*, in Appeal No. 526 of 1931, overruled;

(*iii*) And as regards the share of the ward who was still a minor on the date of the sale by the wards to *X* the suit must fail

D. Ramaswami Aiyangar for Appellant.

S. Panchapakesa Sastri for *T. V. Ramanatha Aiyar* for Respondent.

K.S.

King and Patanjali Sastri, JJ.
19*th February*, 1941.

Alagappa Chettiar *v.* Narayanan Chettiar and others.
A.S. Nos. 188 and 189 of 1938.

Partnership—Joint family manager a partner—Suit for dissolution by—Minor grandson of plaintiff impleaded as pro forma *party—Compromise and receipt of amount by plaintiff—Suit by minor after attaining majority to set aside compromise—C.P.Code, O. 32, r. 7—Applicability.*

The manager of a joint Hindu family who was a partner on behalf of the joint family filed a suit for dissolution impleading his minor grandson as a *pro forma* party and then compromised the suit and received an amount on behalf of himself and his grandson. The grandson after becoming a major filed a suit to set aside the compromise as not binding on him and alleged *inter alia* that sanction of the Court was not obtained for the compromise.

Held, the grandson had no independent right in the suit for dissolution. No member of a Hindu joint family apart from the manager or the partner member could claim any interest in a continuing partnership. O. 32, r.7, cannot apply to cases like this wherein the minor was not interested in his own right.

T.R. Venkatarama Sastri, E. Vinayaka Rao and *C.S. Rama Rao Saheb* for Appellant.

Sir A. Krishnaswami Aiyar and *V. Ramaswami Aiyar* for Defendants.

K.S.

King and Patanjali Sastri, JJ.
19*th February*, 1941.

Vankadan Somappa *v.* N. Venkataswami Chetty.
Appeal No. 72 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3 (ii), *Proviso A—Partner of a firm which paid income-tax—If "agriculturist" under the definition in the Act.*

A partner in a firm which was assessed to income-tax for 1937-1938 (though the partner was not individually assessed) is not an "agriculturist" as defined in the Act.

Ch. Raghava Rao and *Rajaram* for Appellant.

V. Ramaswami Aiyar and *S. Narasinga Rao* for Respondent.

K.S.

Abdur Rahman, J.
19*th February*, 1941.

Minor, Sethu *alias* Ramanathan *v.* M.V.N Palaniappa Chettiar.
S.A. No. 518 of 1940.

Court-Fees Act (VII of 1870), *S.* 7 (3) *and* (9)—*Suit for redemption of pledged jewels—Proper court-fee*

S. 7 cl. 9 of the Court-Fees Act no doubt provides for the redemption of a mortgage and permits court-fees to be paid on the amount indicated in the mortgage instrument, but there is a material difference between a mortgage and a pledge and where a suit is filed for the recovery of jewels valued at Rs. 5,000 on payment of Rs. 900 borrowed on the pledge of the jewels, S. 7, cl. (3) of the Court-Fees Act will be the proper provision applicable and the court-fee payable would be on the value of the jewels and not on the loan.

T. L. Venkatarama Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

The Government Pleader (*B. Sitarama Rao*) for the Government.

K.S.

Somayya, J.
3rd February, 1941.

Mohamed Ibrahim *v.*
Muhamad Ibrahim.
C.R.P. No. 1554 of 1940.

Practice—Amendment of pleadings — New defence inconsistent with original defence—If ground for refusing amendment.

Even if new defences sought to be set up by an amendment are inconsistent with the original defence that will be no ground for refusing the amendment asked for.

Rafiuddin Ahmed for Petitioner.

A. Srirangachariar for Respondent.

K.S.

The Chief Justice and Happell, J.
18th February, 1941.

Varadaraja Pillai *v.*
Rukmani Ammal.
O.S.A. No. 52 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8 and 9—"Decree"—Preliminary decree on mortgage passed after the Act came into force—If liable to be scaled down.

Where a preliminary decree on a mortgage had been passed after the Agriculturists' Relief Act came into force, the debtor cannot subsequently apply to scale it down. *Kotayya* v. *Venkata Punnayya,* (1940) 2 M.L.J. 202, followed.

It is the preliminary decree in a mortgage suit which fixes the rights and liabilities of the parties and it only gives time to the mortgagor to pay off the decretal amount and redeem the mortgage. The final decree does not change the position except that it gives the mortgagee the right to sell the property for realising the amount declared to be due by the preliminary decree.

K.P. Ramakrishna Aiyar for Appellant.

N. Panchanatha Aiyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
20th February, 1941.

P.L.P. Devarayan Chettiar *v.*
S.P. Subramania Iyer and another.
C.R.P. No. 597 of 1937.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—S. 3 (ii)—Renewals by two out of three original debtors—Effect—Crucial date for determining whether debtor is "Agriculturist".

A promissory note of 1929 executed by *R, S* and *T* was discharged by another note of 1932 by them. On 29—7—1935 the suit note was executed by *R* and *S* alone discharging the note of 1932. It was not a case of joint family debt. It was proved that in May 1937 *R* had purchased lands and hence would be an "agriculturist" under Madras Act IV of 1938. *S* was an agriculturist throughout. It was not known whether *T* was or was not an agriculturist. On an application for scaling down,

Held, that the debt of 1932 was apparently due jointly and severally from *R, S* and *T* and it was discharged by another debt due from *R* and *S*, which was sufficient to make the latter debt an 'inclusion' in a fresh document, of the former debt. (1940) 2 M.L.J. 651 and (1940) 2 M.L.J. 786, followed.

(*i*) The liability being joint and several the subsequent note by *R* and *S* is a renewal of the earlier liability;

(*ii*) The relevant period when a debtor has to be an agriculturist to claim the benefit of the Act is the period from and after 1—10—1937 having regard to the proviso to S. 3 (*ii*) of the Act. The purchase of land

N.R.C.

in May, 1937 was sufficient to qualify *E* to claim the benefits of the Act as an agriculturist. (1940) 2 M.L.J. 887, applied. (1940) 2 M.L.J. 174, referred to.

K. S. Ramabhadra Aiyar with *N. G. Krishnamachari* for Petitioner.

V.S. Narasimhachar and *N. Appu Rao* for Respondents.

K.S.

The Chief Justice and Happell, J.
25th February, 1941.

Sri Rajah Venkatadri Appa Row Garu *v.* Timmaraju Venkata Kutumba Row.
L.P.A. No. 15 of 1940.

Civil Procedure Code (V of 1908), *O.* 21, *r,* 89—*Amount paid to save property—Subsequent suit to recover as paid under coercion—Maintainability.*

The defendant, in execution of a money decree against a third party, attached the properties in the possession of the plaintiff which the latter had purchased prior to the attachment. Plaintiff intervened with a claim petition which was rejected. The properties were sold in execution and purchased by the defendant, but plaintiff got the sale set aside by deposit of the requisite amount under O. 21, r. 89, C.P.Code within one year from the claim order. The defendant attached the properties in execution of another decree obtained against the same third party and a second claim petition by the plaintiff was successful. The defendant did not file a suit under O. 21, r. 63, challenging the second claim order and plaintiff's title became perfect. Plaintiff filed the present suit to recover the money deposited under O. 21, r. 89, C.P.Code on the ground that the money was paid under coercion.

Held, that the plaintiff was entitled to recover the amount though it was deposited voluntarily under O. 21, r. 89 to save his own property. 34 L.W. 399, followed. 58 Mad. 972 (F.B.) held not to touch cases of money paid under coercion of law for which a statutory provision is made by S. 72 of the Indian Contract Act. 40 Cal. 598 (P.C.), followed.

Y. Govindarajulu and *B. Lakshminarayana* for Appellant.

M.S. Ramachandra Rao for Respondent.

K.S.

Wadsworth, J.
25th February, 1941.

Bullayya *v.* Lakshminarayana.
C.R.P. No. 1430 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 8, *explanation—Promissory note in favour of* A, B *and* C *discharged by a fresh promissory note in favour of* A *alone—Scaling down.*

In settlement of a *khata* account a promissory note was executed in favour of the partners, *A*, *B* and *C* by *D* who subsequently executed another promissory note in favour of *A* alone in discharge of the first note. In a suit by the assignee of the promissory note from *A*,

Held, that (*i*) the creditor under the second note is not the same as those under the first note within the meaning of the *explanation* to S. 8;

(*ii*) that the debt cannot be sealed down beyond the subsequent promissory note executed in favour of *A* alone; (1940) 2 M.L.J. 664, applied.

Ch. Raghava Rao for Petitioner.

K. Krishnamurthy for Respondent.

K.S.

Wadsworth, J.
26th February, 1941.

Nagabushanam *v.* Venkayya.
C.R.P. No. 1451 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8 (iii), *Proviso—Sole legatee under will executing in* 1936 *a promissory note in discharge of earlier pronotes executed by the testator who died in* 1935*—Scaling down.*

The sole legatee under a will executed in 1936 a promissory note in discharge of earlier pronotes executed by the testator who died in 1935. In a suit on the pronote the legatee being himself an agriculturist applied for scaling down the debt.

Held, that to treat the suit note as a renewal of the prior notes the debtor must show that they were debts due by an agriculturist and that the maker of the notes—the testator—was an agriculturist on and after 1—10—1937. The testator having died in 1935 cannot be treated as an agriculturist on 1—10—1937 and the Court cannot go behind the suit note in scaling down.

Quaere, whether the legatee could claim that his note was in renewal of the testator's debt in case the testator had lived long enough to make the definition of 'agriculturist' applicable to him.

K. Bhimasankaram for Petitioner.

K. Kottayya for Respondent.

K.S.

Lakshmana Rao, J.
26th February, 1941.

Abdul Satar Sahib *v* Rex.
Crl.R.C. No. 208 of 1941.

Madras Motor Vehicles Act (*VIII of* 1914), *S* 42 (1)*—Overloading a bus—Owner of bus when liable for offence.*

In a prosecution of the owner, driver and conductor of a bus for the offence of overloading it was found that the owner was not in the bus and there was no evidence that the owner had permitted the driver and conductor to overload the bus. In the circumstances,

Held, that the owner cannot be convicted for the offence.

G Gopalaswami for Petitioners.

K. Venkataraghavachariar for the Crown

K.S.

King and Patanjali Sastri, JJ.
26th February, 1941.

Palaniappa *v* Ramaswami and others.
A S. No 158 of 1938.

Will—Bequest to widow for life and on her death to the named sons and their male issue—Male issue born to one of the sons after the death of testator and before death of widow—Construction.

*Practice—*Res judicata*—Decision of District Munsif in the exercise of insolvency jurisdiction—Subsequent civil suit in Subordinate Judge's Court—Whether not barred as being beyond the pecuniary jurisdiction of the Munsif—C.P.Code, S.* 11

A testator bequeathed his properties to his widow for life, after her to his sons *K* and *R* and their male issue and in case they had no male issue *K* and *R* were to take their respective shares. At the time of the testator's death the sons had no male issue but before the death of the widow a son *X* was born to *R*. *K* predeceased the widow and *R* having been adjudged an insolvent, the District Munsif exercising insolvency jurisdiction construed the will and disallowed the claim of *X* to a half-share against *R* his insolvent father. *X* then filed a suit in the Subordinate Judge's Court for the recovery of the properties of the testator.

Held, that (*i*) *K* and *R* took a vested interest on the testator's death. 38 Cal. 468 (P.C.), followed;

(*ii*) *X* having been born before the death of the life estate holder obtained a vested interest and to that extent the shares of *K* and *R* became diminished. 40 Mad. 540, followed;

(*iii*) The decision of the District Munsif under S. 4 of the Provincial Insolvency Act is final and conclusive as between the parties, notwithstanding S. 11, C.P.Code, so as to bar the suit though it was beyond the pecuniary jurisdiction of the District Munsif's Court;

(*iv*) In the result *X* was held entitled to a one-sixth share of the estate, that is, one-third of the half-share of *K*.

K.V. Ramachandra Aiyar and *T. N. Sundaresa Aiyar* for Appellants.

K. Desikachari, *R. Viswanatha Aiyar* and *N. D. Varadachariar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ. *27th February*, 1941.

Mrs. Iswariah *v.* Kannappa Chettiar.

O.S.A. No. 1 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), *S* 3, *Proviso* C *and r* 7 *of the rules framed under S* 28—Intra vires.

A debtor proved that he had sold in February, 1935 his house property situate within a Municipality and that the purchaser was paying the property tax thereafter though the debtor's name continued in the municipal register. The trial Court relying on r. 7 of the rules framed under the Act by the Provincial Government permitted the debtor to let in evidence as to sale of his property in rebuttal of the certificate issued by the Collector under S. 28 of the Act and held that the debtor was consequently not excluded from the definition of the term agriculturist. On appeal it was contended that r. 7 was inconsistent with Proviso C and therefore *ultra vires*.

Held, that there was nothing repugnant to the apparent intention of Proviso C in this rule nor could it be said that the rule gave to the Proviso a meaning which was not its probable meaning. It was within the powers of the Provincial Government to make a rule which merely removed an ambiguity in a clause in a statute. The rule is *intra vires* the Provincial Government.

V. Radhakrishniah and *R. Venkataraman* for Appellant.

M. Subbaroya Aiyar and *T. S. Krishnamurthi Aiyar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. *3rd March*, 1941

Srinivasayya *v* Obula Raju

C.R.P. Nos 1689 & 1690 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3 (iii), *Proviso* D —*Debtor owning only a share in a* shrotriam—*Debtor's liability for his own share of* jodi *less than Rs.* 100—*Excluded from operation of proviso*

Where a debtor owns only a share in a *shrotriam* and his liability for his own share of the *jodi* is less than Rs. 100 he does not cease to be an 'agriculturist' and is entitled to the benefits of Act IV of 1938 though theoretically he may be liable to the Government for the whole of the *jodi* due on the *shrotriam*.

Kasturi Seshagiri Rao for Petitioners.

P. Basi Reddi for Respondent.

K.S.

Mockett, J.
4th February, 1941.

Maha Latchayya *v.*
Adi Seshayya.
C.R.P. Nos. 17 and 566 of 1939.

Limitation Act (*IX of* 1908), *S.* 4—*Two contracts between same parties —Breach—Cause of action separately maintainable in Munsif's Court which reopened earlier — Single suit filed on the different causes of action in the Subordinate Judge's Court on reopening date under C.P. Code* (*V of* 1908), *O.* 2, *r.* 3—*Effect on claim based on earliest breach of contract which could have been filed in the Munsif's Court.*

In the place where the causes of action arose there was a District Munsif's Court whose jurisdiction was limited to Rs. 800 and a Subordinate Judge's Court, both having small cause jurisdiction. The Sub-Court was closed for the summer vacation from 1—5—1936 to 1—7—1936 and the District Munsif's Court was closed from 1—5—1936 to 11—6—1936. The defendant by two contracts contracted to deliver 1,000 tins of oil under each contract before 31—5—1933 and 30—7—1933 respectively. On a breach of contract the plaintiff filed a suit in the Sub-Court on 2—7—1936 (the reopening date) for damages, joining under O. 2, r. 3, C.P. Code, the causes of action in respect of the breach of the 1st and 2nd contracts. The claim in respect of the first contract was for Rs. 240 and that under the second Rs. 609. On objection being raised that as the cause of action relating to the breach of the first contract was one within the jurisdiction of the Munsif's Court a suit not having been filed there on the reopening date of that Court, the claim was barred by limitation,

Held, that where the plaintiff has united several causes of action against the same defendant before a Court competent to try, not necessarily those causes of action separately but the suit as a whole, when those causes of action are combined under O. 2, r. 3 of the Code of Civil Procedure, the question of limitation under Ss. 3 and 4 of the Limitation Act is to be regarded with special reference to the jurisdiction of that Court to try the suit and not with reference to the jurisdiction of other Courts which might have been able to try those suits when split up had they been brought before them. There is no reason to imply any restrictions on the facilities given by O. 2, r. 3 to a plaintiff to join several causes of action because it happens that another Court might have tried one of those causes of action sued on.

V. Govindarajachari and *N. Vasudeva Rao* for Petitioner.
P. Satyanarayana Rao and *P. Sivaramakrishnayya* for Respondents.

K.S.

Wadsworth, J.
11*th February*, 1941.

Sree Rajasekharaswami *v.*
Punnayya.
C.R.P. No. 260 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 3 (iii)—"*Debt*"—*If includes liability for rent.*

There is nothing in S. 3 (*iii*) of Act IV of 1938 to exclude an ordinary contractual liability for rent not falling within its definition in S. 3 (*iv*), from the definition of 'debt' in S. 3 (*iii*).

P. Satyanarayana Rao for Petitioner.
Ch. Raghava Rao for Respondent.

K.S.

Wadsworth, J.
11*th February*, 1941.

Manattil Ali *v.*
Vazhapulli Varial.
C.R.P. No. 288 of 1939.

Stamp Act (*II of* 1899), *Ss.* 2 *and* 35—*Negotiable instrument executed in Cochin State bearing a British Indian stamp—Enforceability in British India.*

N R C

A promissory note executed in the Cochin State bore a British Indian stamp. It was contended in defence to a suit on the note that there was a breach of the Cochin law and therefore it was not admissible in evidence.

Held, that there is nothing in S. 35 of the Stamp Act to exclude from evidence a document which has not been properly stamped according to the law of a foreign State. The definitions of 'chargeable' and 'duly stamped' in S. 2 of the Stamp Act make it clear that the Act is only concerned with duty leviable under the law of British India. S. 134 of the Negotiable Instruments Act relates only to liabilities under an instrument and not to the admissibility of that instrument in evidence. Therefore an instrument which is correctly stamped according to the law of British India can be admitted in evidence and the alleged breach of the Cochin stamp law is no defence to the suit.

P. Govinda Menon and *P. K. Moidinkutti* for Petitioner.

D. A. Krishna Variar for Respondent.

K.S.

Wadsworth, J. Veeranna *v.* Silar Bakshs.
12th February, 1941. C.R.P. No. 277 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Scaling down decree after sale had been confirmed on 12—7—1937—Stay of delivery of possession cannot be ordered.

Where a sale in execution of a decree was held on 9—6—1937 and it was confirmed on 12—7—1937 but the decree-holder purchaser had not taken possession on 11—10—1939 when the applications under Ss. 19 and 23 of Act IV of 1938 were made,

Held, that the application under S. 23 was barred and the scaling down of the decree cannot affect the sale which had become final.

Kasturi Seshagiri Rao for Petitioner.

A. Gopalacharlu for Respondent.

K.S.

Patanjali Sastri, J. Ramalakshmamma, Petitioner.
14th February, 1941. C.R.P. No. 91 of 1941.

Hindu Law — Daughter claiming under alleged will of her father — Necessity to prove her title.

A plaintiff who claims under an alleged will of her father will have to establish her title to the property even if she has managed somehow to get possession.

(1940) 2 M.L.J. 572, distinguished.

P. Satyanarayana Rao for Petitioner.

K.S.

Venkataramana Rao and Somayya, JJ. Rama Ayyar *v.*
14th February, 1941. Madhava Rao and others.
Appeal No. 87 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2)—Usufructuary mortgage with possession in lieu of interest in renewal of earlier simple mortgage—If liable to be scaled down—Clause in usufructuary morgage that simple mortgage should be kept alive—Effect.

A usufructuary mortgage dated 9—1—1926 was executed in renewal of an earlier simple mortgage and it stipulated that the mortgagee should be in possession of the property in lieu of interest, no rate of interest being stipulated as being payable to the mortgagee. There was a clause in the mortgage deed that the earlier simple mortgage should be kept alive. It was contended that the suit on the mortgage must be deemed to have been

laid even on the original mortgage and therefore the mortgagee was not entitled to claim the benefit of the exemption under S. 10 (2).

Held, that the clause providing that the earlier mortgage to be kept alive, was put in for the benefit of the mortgagee to shield him against any intervening mortgages and the plaint having been laid only on the mortgage of 9—1—1926 it came directly within S. 10 (2) of Act IV of 1938 and cannot be scaled down.

R. S. Srinivasachari and *K. V. Rajagopalan* for Appellant.

K. Bhashyam and *A. V. Baluswami* for Respondents.

K.S.

Wadsworth, J.
17*th February*, 1941.

Lakshmikantha Rao *v.* Venkatarama Rao.
C.R.P. No. 252 of 1939

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 9 *and* 15—*Promissory note for arrears of rent—Liability to be scaled down.*

In defence to a suit on a promissory note it was contended that the amount was not due because it represented rent which must be deemed to be discharged by reason of S. 15 of Act IV of 1938 though the promissory note was for arrears of rent.

Held, that it is a debt liable to be scaled down under S. 9 and not under S. 15. The debtor cannot compel the promisee to treat his claim as one for rent nor can he treat the liability as being without consideration on the ground that the claim for rent would be met by the defence under S. 15.

(1940) 2 M.L.J. 825, applied.

Ch. Raghava Rao for Petitioner.

S. Venugopala Rao for Respondent.

K.S.

Wadsworth, J.
18*th February*, 1941.

Venkatachariar *v.* Srinivasavaradachariar.
C.R.P. No. 578 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 20—*Joint judgment-debtors—Different debtors cannot make successive applications under S.* 20.

There cannot be a number of successive applications under S. 20 of Act IV of 1938, by different judgment-debtors. The decision in I.L.R. (1939) Mad. 530=(1939) 1 M.L.J. 888 with reference to joint families is equally applicable to joint debtors generally. There shall be only one stay of which all the judgment-debtors should take advantage simultaneously.

V. Rajagopalachari for Petitioner.

R. Gopalaswami Iyengar for Respondent.

K.S.

Mockett, J.
21*st February*, 1941.

Peda Venkatasubbayya *v.* Venkayya.
C.R.P. No. 1797 of 1940.

Madras Debt Conciliation Act (*XI of* 1936), *Ss.* 4, 9 *and* 25—*Dismissal of debtor's application under S.* 9 (b) *and stay under S.* 25 *dissolved—Application by a creditor to continue the conciliation proceeding—Effect.*

A stay of execution of a decree granted under S. 25 of the Debt Conciliation Act was dissolved on account of the dismissal of the debtor's petition under S. 9 (*b*) of the Act for conciliation of his debts, and after the dismissal of a petition by the debtor to restore it, another creditor impleaded in the first petition applied for conciliation of his debt along with the debt of the creditor who was executing his decree previously stayed. The debtor applied again for stay.

Held, that applications by a creditor are intended to be made with regard to his own debts and not with regard to the debts of third parties and a stay of execution of decrees by such third parties cannot be granted.

(1939) 2 M.L.J. 727 and (1940) 2 M.L.J. 923 and C.R.P. No. 2122 of 1939 [N.R.C. (1940) 2 M.L.J. 55] referred to and discussed.

V. Viyyanna for Petitioner.

V. Suryanarayana and *M. V. Nagaramayya* for Respondents.

K.S.

Abdur Rahman, J.
26th February, 1941.

Sivacharya Rajendra Mahaswami *v.* Kadaloor Veerabhadrayya and others.
S.A. No. 885 of 1937.

Religious office—Claim based on ancient custom—Essentials of validity—Constitution or succession of mutt—If can be altered by the head—Headship of mutt if can be partitioned—Right to hold office and collect offerings—If 'property'—Limitation Act, S. 28 and Art. 124—Applicability.

Plaintiff, the head of a mutt, filed a suit against the defendant for a permanent injunction restraining him from functioning as Charapattadhyaksha of the same mutt and from styling himself as such and going about collecting *Kanikais*, etc., from desciples of the mutt and from the pilgrims who gather on the Shree Sailam hill where the famous temple of God Siva is situated. The defence was (1) that the office had been in existence in the suit mutt since 1851, (2) that the defendant had been validly appointed to that office in accordance with the custom and usage of the mutt, (3) that, he also acquired the right to that office by ancient custom and by prescription, and (4) that the suit of the plaintiff was barred by limitation because to the knowledge of the plaintiff for over 12 years prior to the suit he had been functioning as Charapattadhyaksha.

Held, that (1) the office of the Charapattadhyaksha came into existence in 1851, *i.e.*, within living memory; therefore, the claim of the defendant based on customary usage cannot be supported. (1893) A.C. 104; 5 W.R.P.C. 69; 115 E.R. 19; (1867) 2 H.L. 39; 107 E.R. 554; 43 Cal. 707, referred to and relied on; (2) that it was not possible for a mahant to alter the constitution or succession of a mutt of which he was in charge, (3) that the headship of a mutt cannot be a matter of partition. The claim therefore of the defendant based on prescription must be negatived. (6 Bom. 298; 29 Mad. 293; 44 Mad. 205; 24 M.L.J. 75; 70 M.L.J. 424 were distinguished and held inapplicable on the ground that they were cases which related to trustees of temples where the office was to devolve hereditarily either on only one member or on all members of the family.) In the case of a mutt, the successor of the mutt has to be appointed in accordance with the rules prescribed by the founder or in their absence in accordance with the usage of the mutt; (3) that the suit however must be held to be barred by limitation. S. 28 and Art. 124 of the Limitation Act apply to the case. The term "property" in S. 28 has not been used in the sense of immoveable property alone. Rights such as a right to graze flocks of sheep in certain woods or a suit for 'dharmakartaship' of a pagoda came within the term 'property'. The right to hold the Charapattadhyaksha office with power to collect kanikais from disciples of the mutt is property' within the meaning of S. 28. The suit not having been brought within twelve years from the date of knowledge that defendant has been functioning as Charapattadhyaksha as required under Art. 124 it must fail. (1940) 2 M.L.J. 990 (F.B.), distinguished; 43 Mad. 253; 43 Mad. 665 and 37 Cal. 885, followed.

V. S. Narasimhachari and *Kasturi Seshagiri Rao* for Appellants.

A. C. Sampath Iyengar and *S. Krishnamachari* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
27th February, 1941.

Karupanna Goundan *v.*
Marutha Pillai.
C.R.P. No. 1206 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Explanation—Hindu joint family debt—Partition—Fresh document by a member not an executant of the original note—If renewal.

On 2—3—1925 the defendant's father and brother executed a promissory note in renewal of a series of earlier ones. In a partition in the debtors' family the debt was allotted to the defendant. He thereafter executed the suit promissory note on 12—7—1932, discharging the prior note by his father and brother. In an application for scaling down,

Held, that the suit debt is not due from the same debtor as the first debt and cannot therefore be regarded as a renewal or inclusion in a fresh document of that debt.

K. S. Desikan and *K. Raman* for Petitioner.

S. Panchapagesa Sastri for Respondent.

K.S.

Venkataramana Rao, J.
3rd March, 1941.

The Madura Municipality *v.*
Nataraja Pillai.
S.A. No. 594 of 1937.

Madras District Municipalities Act (V of 1920), S. 145—Flush-out latrines—Erection by Municipality constituting private nuisance—Claim to restrain—Erection under statutory duty—If defence.

A suit was filed against the Madura Municipality for an injunction restraining it from erecting a public flush-out latrine on the ground that it obstructed plaintiff's right of free access to the road from the back of his house and also prevented a full view of his house. The Municipality contended that the erection in question was authorised under S. 145 of the District Municipalities Act being one of their compulsory statutory duties even if it amounted to a private nuisance.

Held, that the erection of the public flush-out as it was found to amount to a nuisance cannot be taken to be authorised by S. 145 of the District Municipalities Act. 16 Ch. D. 449, applied. The difference between the terms of the local enactment and the English statutes should be regarded as immaterial for this purpose.

K. Rajah Aiyar and *C. S. Rama Rao Saheb* for Appellant.

A. Ramaswami Aiyar and *N. Sivaraj* for Respondent.

K.S.

F.B.

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
3rd March, 1941.

In the matter of P, a Pleader.
R.C. No. 12 of 1941.

Legal Practitioners' Act (XVIII of 1879), S. 32—Failure of pleader to apply for renewal of his sanad till a few months after due date—Offence—Punishment.

It is manifest that for a pleader to practise for ten months without renewing his sanad is a serious matter and the offence cannot be condoned. S. 32 of the Legal Practitioners' Act empowers the Court to impose a fine equal to ten times the amount of the stamp required for a certificate authorising him to practise. The duty is Rs. 25. In the circumstances the pleader was fined Rs. 75 and his sanad was directed to be renewed on payment of the fine and not before.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) in support of the Notice.

V. Subramanyam for Pleader.

K.S.

Happell, J.
4th March, 1941.

Sundararaja Mudaliar *v.* Krishnaswami Iyer and others.
C.R.P. No. 1091 of 1940.

Indian Succession Act (XXXIX of 1925), *S.* 381—*Succession certificate—Application for by son of deceased—Application by debtor to be impleaded*—Locus standi.

In an application by a son of a deceased person, for the grant of a succession certificate, a debtor to the estate of the deceased has no *locus standi* to be impleaded as a party. Section 381 of the Indian Succession Act, 1925, affords full indemnity to the debtor, on payment to the holder of the succession certificate.

Accordingly where an application was made for the grant of a succession certificate by a person claiming to be the legatee under the will of his deceased mother and entitled to the debt specified therein, the debtor who had not disputed the debt applied to the Court to be impleaded therein for the purpose of opposing the grant of the certificate to the petitioner disputing the genuineness of the will.

Held, that the debtor had no *locus standi* to apply.

T. R. Srinivasan for Petitioner.

S. Jagadisa Iyer and *G. R. Jagadisan* for Respondent.

K.S.

F.B.

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
6th March, 1941.

Kandasami Thambiran *v.* Vagesam Pillai.
A.S. No. 137 of 1938.

Specific Relief Act (I of 1877), *S.* 42, *Proviso—Suit for declaration of title to office of headship of mutt and for possession of the same—Prayer for possession of endowments of the mutt essential as consequential relief.*

K filed a suit against the present Pandarasannadhi of the Kunnakudi Mutt for a declaration that he was not lawfully appointed and prayed for possession of the office, injunction and other reliefs. But no prayer for possession of the properties of the endowments was included. On appeal, the High Court held following the decisions in 54 Mad. 1011 and 55 Mad. 549, that the suit was one in which the private right of the plaintiff to the office was in question and no sanction of the Hindu Religious Endowments Board was necessary for the maintainability of the suit. But the other question whether the suit as framed was barred under S. 42 of the Specific Relief Act was referred to a Full Bench in view of the conflicting decisions in 33 Mad. 452 and 47 M.L.J. 671.

Held, by the Full Bench, that the view in 33 Mad. 452, that a plaintiff who sues for a declaration of his right to the office is bound to sue for possession of the properties belonging to the endowment is correct on the ground that the claim to properties follows the claim to the office and relief to one could not be asked for without praying for the other. In the result the suit was held to be barred under the proviso to S. 42 of the Specific Relief Act.

33 Mad. 452, followed.

47 M.L.J. 671 and 28 Bom. 567, disapproved.

A. C. Sampath Iyengar and *S. Narasinga Rao* for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for Respondent.

K.S.

The Chief Justice and Mockett, J.
7th March, 1941.

Pattu Achi *v.*
V. Rajagopala Pillai.
L.P.A. No. 17 of 1940.

Hindu Law—Adoption—Alienation by adoptive mother after death of first adopted son and before second adoption — Right of subsequently adopted son to recover the property from alienees.

A widow with authority from her husband adopted in 1891 *P* who died in 1907. In 1922 she made a partition with the nearest reversioner conveying to him a portion of the inherited estate. In 1926 she adopted the plaintiff who in 1934 filed the present suit to recover the properties conveyed to the reversioner in 1922.

Held, that (*i*) the plaintiff is to be regarded only as heir to the first adopted son and as such an heir inferior to the adoptive mother;

(*ii*) the restrictions on the powers of a widow or mother being the same the alienees in both cases would hold the property only so long as there was no adoption or re-marriage by the widow and the alienees could not successfully resist a suit by the adopted son to recover possession of the property alienated to him;

(*iii*) the plaintiff would be entitled to recover possession of the property from the alienee even during his adoptive mother's lifetime. 2 Mad. 99 at 101 (P.C.); 41 Mad. 855 at 859; 59 Mad. 1064 at 1077, followed. 49 Bom. 604, and Mayne's Hindu Law § 197, p. 267, commented upon. 39 Mad. 1085 and 48 Mad. 933, referred to. Case-law discussed.

K. Rajah Aiyar, K. Venkataramani and *V. Ramaswami* for Appellants.

T.M. Krishnaswami Aiyar and *C.A. Seshagiri Sastri* for Respondents.

K.S.

Burn and Lakshmana Rao, JJ.
7th March, 1941.

Srinivasa Iyengar *v.*
Balasubramania Edangapirandar.
C.R.P. No. 1667 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Dismissal of second appeal in July, 1938—Reservation of rights to get decree scaled down—Effect on right to get decree scaled down in trial Court.

While dismissing a second appeal in a suit on a promissory note in July, 1938 the Court noted at the end of the judgment at the appellant's request that nothing in the judgment would debar the debtor appellant from filing an application to the lower Court under S. 19 of Act IV of 1938, *see* (1939) 1 M.L.J. 68. The debtor then filed an application to the trial Court for scaling down the decree against him.

Held, that S. 19 of the Act was inapplicable to decrees passed after the Act came into force and that no rights could be deemed to have been reserved to the debtor at the time of the dismissal of his second appeal. In any event the reservation of such rights would be contrary to the provisions of the Act and would therefore be invalid. The decree cannot therefore be scaled down.

N. Rajagopala Aiyangar for Petitioner.

S. Muthia Mudaliar and *M. Krishna Bharati* for Respondent.

K.S.

Lakshmana Rao, J.
7th March, 1941.

Raghaviah and others
v. Pitchayya.
Crl.R.C. No. 125 of 1941.

Code of Criminal Procedure (V of 1898), S. 350-A—Legality of trial held by Bench Magistrate when one of the Magistrates who signed the judgment of the Bench was not present at all the sittings of the Bench Court.

After the amendment of the Criminal Procedure Code and the enactment by the legislature of S. 350-A, a trial held by a Bench of Magistrates will not be vitiated merely because one of the Magistrates who signed the judgment was not present at some of the meetings of the Bench Court. Before a trial becomes illegal it should be shown that the Magistrate who signed the judgment did not hear all the evidence in the case. Mere absence of the Magistrate when arguments were addressed and when some accused were discharged and others were charged, would render the trial only irregular and not illegal.

Kasturi Seshagiri Rao for Petitioner.

The Public Prosecutor (*V.L.Ethiraj*) for the Crown.

K.S.

Abdur Rahman, J.
10*th March*, 1941.

Bhaghavathia Pillai *v.*
Viravahu Pillai.
S.A. No. 293 of 1938.

Easement—Right of way conferred by sale deed—Right of way for scavengers—If can be claimed as easement of necessity—Right under sale deed dependent on circumstances existing at the time of transfer of property.

Defendant, a neighbour of the plaintiff was given a right of way along the front yard of the plaintiff's house under a sale relating to the plaintiff's house in 1908 and the right of taking back yard ashes and sewage water in his back yard was secured to the defendant under a sale deed to his predecessor-in-title in 1897. The defendant after his purchase in 1925 put up a pucca latrine in his back yard and claimed a right of way for the scavengers along the front yard of the plaintiff's house as an easement of necessity. The scavenger had been going along the plaintiff's front yard for about ten years and there was no other means of access to the defendant's premises by the scavenger.

Held, that the right of way originally given along the plaintiff's front yard was restricted and not general, that the circumstances existing at the time of the transfer of the house must alone be taken into account and that the defendant was not entitled to the right of way for his scavenger as an easement of necessity. 57 Bom. 186, distinguished. 58 Mad. 449=59 M.L.J. 956; 22 Bom.L.R. 1181; A.I.R. 1937 Cal. 661 and A.I.R. 1937 Pat. 589, referred to.

K. Venkateswaran for Appellant.

C. Srinivasan for Respondent.

K.S.

Mockett, J.
21st February, 1941.

Thandapani Chettiar
v. Vanderveen.
C.R.P. No. 1656 of 1940.

Indian Soldiers Litigation Act (IV of 1925), S. 11—Charge-man employed in cordite factory—If entitled to the benefits of the Act modifying the law of limitation.

The respondent was employed as chargeman in a cordite factory and more than three months after a court-sale of his properties in execution of a decree against him, he applied to have the sale set aside under O. 21, r. 89, C.P.Code and claimed the benefit of S. 11 of the Indian Soldiers Act of 1925 for extending the period of limitation for his application.

Held, that the respondent was not a soldier and hence the Act of 1925 had no application to him and the period of limitation cannot be extended.

K. Bhashyam Aiyangar and *T.R. Srinivasan* for Petitioner.

Pais, Lobo and *Alvares* for Respondent.

K.S.

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Wadsworth, J.
25th February, 1941.

Govinda Mudali *v.* Subbaraya Iyer.
C.R.P. No. 1786 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 20 and 19—Joint family debtor—Consecutive applications by different coparceners—If maintainable.

Act IV of 1938 regards the family as a unit which may be represented by any member—the exception being the special provisions of S. 14 for dealing with the non-agriculturist coparcener. It cannot have been the intention of S. 19 to allow an indefinite number of coparceners to bring successive applications each asking for the same relief on behalf of the same coparcenary. An earlier application will bar a fresh application by a joint family judgment-debtor who was represented by the former applicant.

Decision of Newsam, J., in *Gopi Reddi* v. *Rama Reddi,* I.L.R. (1939) Mad. 530=(1939) 1 M.L.J. 888, approved.

C. S. Swaminathan for Petitioner.

P. G. Menon for Respondent.

K.S.

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King and Patanjali Sastri, JJ
26th February, 1941.

Paramasivam (Receiver) *v.*
Chenchuramireddy.
A.S. No. 184 of 1938.

Provincial Insolvency Act (V of 1920), Ss. 38 and 39—Scheme for composition—Provision for some creditors giving up claim against others who were sureties—Non-consenting creditors—How far bound inter se *by the provision in the scheme.*

In a scheme for the composition of the insolvent's debts there was a provision that certain creditors should receive a larger dividend in pursuance of the settlement than the ordinary creditors as consideration for their giving up their claims against other creditors, the sureties of the debtor. In a suit for enforcing a debt by a creditor who did not consent to the scheme, against the surety, it was contended that the settlement in the insolvency was a bar to the suit and the only remedy of the creditor was to have appealed against the scheme.

Held, that the scheme being one imposing an obligation upon one creditor to give up his claim against another, S. 39 cannot possibly cover the case and the fact that the plaintiff did not consent to the scheme approved by the majority of creditors under S. 38 made the provision in the composition not binding upon him and therefore will not bar the suit.

V. Subramanyam for Appellant.

D. R. Krishna Rao for Respondent.

K.S.

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N R C

The Chief Justice and Happell, J.
27th February, 1941.

Seetharama Chettiar *v* Sheik Abdul Rahiman Sahib
L.P.A. No. 22 of 1940.

Limitation Act (IX of 1908), *Art* 182 (2) *'Appeal'—Meaning.*

In an appeal arising out of an application filed in 1935 to execute a decree of 1929 on the question whether the application was barred by limitation it was contended by the decree-holder that his application was not barred as it was within three years from 1933 when an 'appeal' against an order dismissing the judgment-debtor's application to record satisfaction of the decree was dismissed.

Held, that the word 'appeal' in Art. 182 (2) of the Limitation Act would not mean any appeal the result of which may affect not the decree itself but only the decree-holder's right to execute it at a particular time and in particular circumstances, and that the application for execution was barred.

Decision of King, J., in (1940) 2 M.L.J. 371, affirmed.

K. Rajah Iyer for Appellant.

P. S. Narayanaswami Iyer for Respondent.

K.S.

King, J.
27th February, 1941.

Konda Reddi and others *v.* Lakshmamma.
A.A.A.O. No. 50 of 1938.

Practice—Decree against widow—Executing Court's power to construe the decree by reference to pleadings, etc.

In a suit against a widow on two promissory notes the plaint specifically stated "It is prayed that a decree may be passed enabling the plaintiff to recover the plaint amount and court costs together with subsequent interest upto the date of payment from out of the movable and immovable properties belonging to the late *S* (the defendant's husband) which are in the possession of the defendant". The decree was simply that "the defendant do pay" which on the face of it would only amount to a personal decree. In the execution of the decree,

Held, that the pleadings and judgment can be consulted in order that the decree may be properly interpreted.

10 Cal. 985, relied on.

The plaintiff claimed to proceed against the estate and the right must be deemed to have been given to the plaintiff by the judgment and decree.

E. Vinayaka Rao for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

The Chief Justice and Mockett, J.
7th March, 1941.

Ethirajulu Naidu *v.* Ranganatham Chetti and others.
C.M.P. No. 1411 of 1941.

Practice—Stay of execution pending application for special leave to appeal to the Privy Council—Power of High Court to grant.

Where a party after an unsuccessful application for leave to appeal to the Judicial Committee wishes to move for special leave, the High Court has in such circumstances power to grant a stay of execution.

Nanda Kishore Singh v. *Ram Gola Sahu,* I.L.R. 45 Cal. 955, approved.

A. Viswanatha Aiyar and *T. S. Muthuswami* for Petitioners.

A. Subramaniam for Respondents.

K.S.

Venkataramana Rao and Somayya, JJ.
11th March, 1941.

Ajaba Nateswaran *v.* Sri La Sri Vaidyalinga Pandarasannadhi.
A.S. No. 207 of 1939.

Madras Hindu Religious Endowments Act, S. 78—*"Adhinam"—If included in "Mutt".*

In a suit under S. 78 of the Hindu Religious Endowments Act (with the sanction of the H.R.E. Board) for the removal of the Adhinakartha from the Velakurchi Adhinam, Tinnevelly District, it was contended that the word 'Adhinam' was unknown to the Act and Hindu Religious Endowments Board could not give sanction to such a suit.

Held on appeal, that the word "Adhinam" is included in the word "Mutt" in the Act, and that the Board could give sanction under S. 78 in respect of such an institution.

A. V. Visvanatha Sastri and *R. Sundaralingam* for Appellant.

S. Ramachandra Aiyar and *R. Chakravarthi* for Respondent.

K.S.

Pandrang Row and King, JJ. Kunchithapadam Pillai *v.* Saraswathi Ammal.
11th March, 1941. C.M.A. No. 206 of 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Scope—Starting point of limitation—Whether date of abatement or of dismissal of appeal.

The assignee of a decree-holder applied for execution which was ordered. An appeal was filed but the appellant died on March 23, 1933 and no application was made within 90 days to bring his legal representatives on record. The appeal was dismissed as having abated on September 17, 1935. On an execution petition filed on April 6, 1938,

Held, that the application was not barred as limitation under Art. 182 (5) began to run only from the date of the dismissal of the appeal the same being a final order within the meaning of the Art. 182 (5). 32 C.W.N. 887, followed.

R. Sundaralingam for Appellant.

K.P. Ramakrishna Aiyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Rajah of Venkatagiri *v.* Minor Sirigiri Ramanjulu Chetti minor by Irla Pulliah Chetty.
12th March, 1941. C.R.P. No. 1329 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (iv) and 15 (4)—"Rent"—If includes "Jodi".

"Rent" as defined by S. 3 (iv) of Act IV of 1938 and for the purposes of that Act includes 'quit rent' 'jodi' 'kattubadi' 'porruppu' or the like payable to the land-holder in an estate as defined in the Madras Estates Land Act, 1908. A person liable to pay 'jodi' is therefore a tenant, and the property in respect of which such rent, has accrued is a 'holding': S. 15 (4) is accordingly applicable to such 'jodi' as rent. In estates like Kalahasti and Venkatagiri the Zamindar can be held to be the land-holder of an inam village though the Inamdar himself may be also a land-holder.

P. V. Rajamannar and K. Subba Rao for Petitioner.

N. C. Subbayya for Respondent.

K.S.

The Chief Justice and Somayya, J. Ramalinga Iyer *v.* Jayalakshmi Ammal.
13th March, 1941. C.R.P. No. 162 of 1940.

Civil Procedure Code (V of 1908), S. 20—Wife's suit for maintenance and recovery of stridhan, etc., against her husband and father-in-law—Place of suing—Common law rule that debtor should seek the creditor and pay him where he resided—Applicability—Contract Act, S. 49.

The plaintiff's marriage took place at Negapatam and owing to the illtreatment by her husband at Vellore where they were last residing she re-

turned to her father's place at Palghat. Her father-in-law was residing at Mayavaram. She filed a suit in the Court of the Subordinate Judge, Palghat against her husband for maintenance and against her father-in-law for the return of her properties alleged to have been entrusted to him at the time of marriage. On the question of jurisdiction it was contended that in the absence of a contract to the contrary the English Common Law rule that the debtor must seek the creditor applied and therefore the Palghat Court had jurisdiction.

Held, that the Palghat Court had no jurisdiction, because the cause of action for either the right to recover maintenance or for the re-delivery of the entrusted properties, (return of which must have been contemplated at the family residence at Mayavaram or at the place where the husband resided) did not arise at Palghat.

5 Rang. 451=53 M.L.J. 25 (P.C.); 31 Mad. 223 and (1940) 1 M.L.J. 558, discussed.

M. Ranganatha Sastri for Petitioner.

Ch. Raghava Rao for Respondent.

K.S.

[F.B.]

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ. — In re Adhi Lakshmi Ammal.

17th March, 1941. — Cr.R.P. Nos. 1052 of 1940, etc.

Madras Prohibition Act (X of 1937), S. 4 (1) (a)—Validity—Repugnancy to Abkari Act and Dangerous Drugs Rules (1930)—Effect.

S. 4 (1) (a) of the Madras Prohibition Act is entirely repugnant to the Hemp and Drug Rules because it prohibits a person from possessing any *ganja* whatsoever. So far as possession of *ganja* or any other dangerous drug is concerned the provision is *ultra vires* the Madras Legislature as it relates to a subject in the concurrent list under S. 107 of the Government of India Act 1935 and the impugned Act was not reserved for the consideration of the Governor-General.

M. Natesan and *A.N. Veeraraghavan* for Petitioners.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *A. S. Sivakaminathan* for the Public Prosecutor, for the Crown.

K.S.

Wadsworth, J. — Seethalakshmi v. Nagaswami Aiyar.

18th March, 1941. — C.R.P. No. 614 of 1938.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (iii)—"debtor"—Meaning—Heir of the maker of a promissory note—Whether "debtor".

Where a decree is obtained against the daughter of the maker of a promissory note, making the daughter liable for the debt to the extent of the assets of her father in her hands as heir, the daughter is a "debtor" entitled to the benefits of the Act.

C.R.P. No. 1694 of 1938, relied on. [In C.R.P. No. 1694 of 1938, His Lordship *Wadsworth, J.* observed as follows: "In view of *Periannu v. Sellappa,* (1938) 2 M.L.J. 1068 and the many decisions flowing from it, it cannot be contended that for the purpose of Act IV of 1938, it is only the actual borrower who can claim the benefits of the Act. Clearly a son who is made liable for his father's debts to the extent of the family properties in his hands is under a liability which can be scaled down under the Act".]

T.P. Gopalakrishna Aiyar for Petitioner.

Respondent not represented.

K.S.

Krishnaswami Aiyangar, J.

Tulasidas Murarji Sait *v.* P.S. Sethuramaswami Iyer and others.
C.R.P. Nos. 1224 and 1225 of 1940.

Civil Procedure Code (V of 1908), O. 23, r. 1—Withdrawal of one of several plaintiffs without consent of others—When permissible.

A suit was instituted by plaintiffs 1 and 2 along with the 3rd plaintiff (petitioner) for the specific performance of a contract of reconveyance entered into between the first two plaintiffs and the defendant. The 3rd plaintiff was the financier of the first two plaintiffs. Disputes arose between the 3rd plaintiff and the other plaintiffs and the former sought to withdraw from the suit unconditionally under O. 23, r. 1, C.P.Code.

Held, that one of several plaintiffs can withdraw from the suit without the consent of the others in cases where no prejudice will be caused to the latter in the further conduct of the suit. 29 Bom.L.R. 299 and 9 Cal.L.R. 332, followed. I L.R. 57 Mad. 299, explained.

D. Ramaswami Aiyangar and *T. P. Kannabhiran* for Petitioner.

S. Panchapagesa Sastri and *P.S. Ramachandran* for Respondents.

K.S.

Abdur Rahman, J.
19th February, 1941.

Garai Gowder *v.* Rajammal.
S.A. No. 787 of 1938.

Hindu Law — Widow — Maintenance — Provision made by father-in-law—Death of father of widow and loss of material help from him—If ground for enhancement.

A father-in-law had out of his separate property provided by a deed for the maintenance of his daughter-in-law at Rs. 95 per annum. After the father-in-law's death a suit was filed by the widow alleging that the amount was fixed " without any consideration to her needs and circumstances and the properties of her husband's family " as she was then living with her father who was in affluent circumstances and in a position to maintain her in comfort and according to her status, but that on account of the subsequent demise of her father and her inability to live with her brother she found the amount of maintenance fixed by the deed too meagre to live upon. She also alleged that the income of the family had increased from Rs. 3,000 to Rs. 5,000 per annum. She claimed enhancement in the rate of maintenance.

Held, that the change in the plaintiff's circumstances caused by her father's death can be taken into account in considering the question of enhancement of the widow's maintenance allowance.

T.R. Ramabhadrachari for Appellant.

N. Somasundaram for Respondent.

K.S.

Wadsworth, J.
21st February, 1941.

Srinivasa Aiyangar *v.* Kumaraswami Naicker.
C.R.P. No. 1592 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Explanation—Joint family debt undertaken to be discharged and fresh notes executed by three out of the six coparceners at a partition—If renewal.

A family debt of 1917 was the subject of an agreement at partition whereby three only of the six coparceners took over the liability in unequal shares and executed promissory notes to the creditor for the amount of those shares.

Held, when at a partition the joint liability was terminated and new and individual liabilities were created the identity of the debt was destroy-

ed and it cannot be said that the original debt was renewed or included in a fresh document between the same parties. The debt must therefore be treated as one originating at the date of the later notes sued on.

B. Ramasubbu Aiyar for Petitioner.

K.S.

The Chief Justice and Happell, J.
20th February, 1941.

Zamindar of Tuni *v.* Tirupatayya.
L.P.A. No. 37 of 1939.

Madras Local Boards Act (XIV of 1920), *Ss.* 88 *and* 89—*Suit for recovery of cess—Limitation.*

When a landholder purports to exercise powers under the Madras Estates Land Act extended by the operation of S. 89 of the Madras Local Boards Act for the recovery of cess from a person who is not a ryot but may be treated as such for the special purpose, he must exercise the powers subject to the procedure, limitations and restrictions contained in the Madras Estates Land Act. The power conferred under S. 89 of the Local Boards Act includes a power to file a suit against an under-tenure-holder for a cess rent and is not merely confined to the use of the same procedure and such a suit will be governed by Art. 120 of the Limitation Act. There cannot be any difference in principle when distraint is levied or property is sold summarily and when a suit is brought under S. 77 of the Madras Estates Land Act

Decision of *Wadsworth, J.*, affirmed.

P Somasundaram for Appellant.

V. Viyanna for Respondent.

K.S.

Somayya, J.
28th February, 1941.

Palanisami Pillai *v.* Raghavachariar.
C.R.P. No. 585 of 1939.

Practice — Execution — Jurisdiction — Decree in suit for more than Rs. 100—*Presiding officer at time of execution application not having jurisdiction beyond Rs.* 100—*"Proper Court" to entertain execution application.*

A decree sought to be executed was passed in a small cause suit in which the claim was for over Rs. 100 when the presiding officer had small cause jurisdiction up to Rs. 300. At the time of the execution application the officer who presided over the Court had no small cause jurisdiction beyond Rs. 100. On the question whether the application was presented to the "proper Court",

Held, that the Court which passed the decree had power to execute the decree notwithstanding the provisions of S. 37, C.P Code and therefore the application was made to the proper Court.

A.I.R. 1933 Cal. 684 and 39 I.C. 63, followed.

K.R. Rangaswami Aiyangar for Petitioner.

A. Srirangachariar for Respondent.

K.S.

Venkataramana Rao, J.
3rd March, 1941.

Sitayya *v.* Gangaraju.
S.A. No. 303 of 1938.

Practice—Service of summons—Declaration of sufficiency—Form of order.

An order that "defendants refused summons in the ordinary course as well as by post. Absent, *ex parte*," must be deemed to be a declaration to the effect that the service is sufficient.

B. C. Seshachala Aiyar for Appellant.

V. Viyanna for Respondent.

K.S.

[F.B.]

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
4th March, 1941.

Bhagavantulayya Dhora and others *v.* Venkadhora and others.
L.P.A. No. 8 of 1940.

Mortgage—Undertaking to pay "by 10—9—1928"*—Tender in June,* 1927, *of an amount short by Rs.* 4 *for principal and interest—Refusal of tender by mortgagee on the ground that mortgage could not be redeemed before* 10—9—1928*—Whether mortgagee could subsequently object to the amount of the tender.*

There was a covenant in a mortgage as follows: " We shall pay all the principal and interest payable under this document by 10—9—1928". The mortgagor tendered in June, 1927, the amount of Rs. 760 which was short by Rs. 4 of the exact amount due on that date and the mortgagee refused the tender on the ground that the mortgage could not be redeemed before 10—9—1928.

Held, that (1) the mortgagor was entitled to redeem on or before 10—9—1928. Case-law reviewed;

(2) Where a tender of an amount towards a mortgage was refused not because the amount tendered was short by Rs. 4 but because the mortgagee considered that he was entitled to wait until a much later day, *viz.*, 10—9—1928, the refusal of the tender on that ground waived any objection that the mortgagee may have had to the amount being short. It was not open to him to raise the question of the amount of the tender or ask for the application of the *de minimis non curat lex* rule.

V. Govindarajachari for Appellant.

G. Chandrasekara Sastri for Respondent.

K.S.

Pandrang Row, J.
7th March, 1941.

Subbiah Naidu *v.* Parvathathachi.
C.R.P. No. 971 of 1939.

Limitation Act (IX of 1908), *Arts.* 49 *and* 145*—Applicability.*

The plaintiff sued to recover a certain jewel or its value, in pursuance of a decision of the High Court in revision in an earlier suit filed on a promissory note by the defendant against the plaintiff. In the earlier suit the High Court in revision had decreed the claim based on the promissory note and had stated that the plea of the defendant in that suit about a jewel which he had kept with the plaintiff in that suit must be agitated in a fresh suit if necessary. The present suit was thereupon filed. On the question of limitation,

Held, that the Art. 49 is not applicable and the suit must be deemed to be one to which Art. 145 applies and the suit is within time.

S. Panchapagesa Sastri and *K.R. Krishnaswami* for Petitioner.

K.S. Champakesa Aiyangar and *K.C. Srinivasan* for Respondents.

K.S.

The Chief Justice and Somayya, J.
12th March, 1941.

Krishna Reddy *v.* Satyam and others.
C.M.P. No. 235 of 1941.

Madras Hereditary Village Offices Act (III of 1895), *S.* 14 (1)*—Suit for recovery of office and emoluments—Suit filed more than three years from date of cause of action—Jurisdiction of Revenue Court to entertain.*

In a suit for the recovery of an office and its emoluments filed before the Collector, the question arose whether mesne profits can be claimed for more than three years before suit.

Held, that if the cause of action accrued more than three years before the presentation of the plaint the Collector has no power to grant the plaintiff a decree for mesne profits for a period greater than three years.

Kasturi Seshagiri Rao for *D. Suryaprakasa Rao* for Petitioner.

G. Chandrasekhara Sastri for Respondents.

K.S.

Venkataramana Rao, J.
14th March, 1941.

Madelimsetti Ramiah *v.* The Liquidator, Bollanka Co-operative Credit Society, Ramachandrapur.
S.A. No. 269 of 1940.

Madras Co-operative Societies Act (VI of 1932), S. 48 and r. 22 (17-c) —Property brought to sale by liquidator of co-operative society in execution of a decree obtained by the society—Person failing in his claim petition—Prior leave of Registrar—If necessary for filing a suit to establish his right to the property.

Certain properties having been brought to sale by the liquidator of a co-operative society in execution of a decree obtained by the society, a claim petition in respect of those properties proved unsuccessful. In a suit filed by the claimant for establishing his right to the property sought to be sold it was contended that the suit was not maintainable without the prior leave of the Registrar.

Held, that such a suit having been provided for under r. 22 (17) (c) of the rules framed by the Provincial Government in exercise of its power under S. 65 of the Co-operative Societies Act, which makes such rules part of the statute, the suit must be deemed to have been expressly provided for by the Act itself and therefore maintainable, and that the prohibition under S. 48 affects only suits not expressly provided for.

K. Bhimasankaram for Appellant.

A. Lakshmayya for Respondent.

K.S.

Mockett, J.
14th March, 1941.

Saukaralingam Pillai *v* Sonaiya Pillai
C.R.P. No. 728 of 1938.

Assignment of usufructuary mortgage for consideration—Dispossession of assignee by prior mortgagee—Right of assignee to recover money as consideration which had failed.

The defendant on 25—1—1936 assigned a usufructuary mortgage to the plaintiff who paid in return Rs. 100. In October, 1936 the plaintiff was dispossessed by another mortgagee of whose existence he did not know. There was also an indemnity in the assignment in the following terms: "I affirm that these properties have not been included in any other incumbrance: if it be found to be included in any other encumbrance, I will myself discharge them". In a suit against the defendant for the recovery of the Rs. 100,

Held, that the indemnity would cover also incumbrances other than those made by the defendant himself and in any event the plaintiff was entitled to recover the amount as a consideration which had wholly failed as the defendant had no right to assign the mortgage.

K. V. Srinivasa Iyer for Petitioner.

K. S. Desikan for Respondent.

K.S.

Wadsworth, J.
17*th March*, 1941.

P. Ramamurthi Pantulu *v.* Sri Sri Sri Lakshminarayana Harichandra Jagaddaveva Raja Bahadur.
C.R.P. No. 2169 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 15 *and* 19—*Joint and several liability of agraharamdars to pay* kattubadi—*Purchaser of a defined portion of the agraharam.*

The petitioner, a purchaser of a defined portion of an agraharam, was one of the many judgment-debtors under a decree dated 28—3—1925 for *kattubadi* payable to the Zamindar. It was contended on behalf of the petitioner that his liability was only proportionate to the share which he had purchased and that he was entitled to the benefit of S. 15 of the Act by depositing his proportionate share of the *kattubadi* for faslis 1346 and 1347.

Held, that the decree is joint and several imposing the liability for the whole of the arrears of *kattubadi* on all the defendants. The extent of the Court's powers under the Act in amending decrees is narrowly defined and it cannot be extended to the correction of decrees which appear to be erroneous in other respects. If the petitioner wants to get his liability under the decree scaled down, he must do so on the basis of the decree as it stands by depositing the two faslis' rent for the whole of the holding for the arrears on which he has been held jointly and severally liable.

A. Dorairaj for Petitioner.

G. Chandrasekhara Sastri for Respondent.

K.S.

Wadsworth, J.
17*th March*, 1941.

Nijamohideen Rowther, Petitioner.
C.M.P. No. 1405 of 1941.

Civil Procedure Code (V of 1908), *O.* 22, *r.* 4, *sub-r.* (4)—*Judgment passed in ignorance of the fact that one of the parties was dead—If can be validated subsequently.*

An order against a party who is dead is a nullity. It cannot be held that a judgment passed in ignorance of the fact that one of the parties was dead can bind the dead party merely by force of a subsequent order allowing the appeal to be treated as if it had been decided advisedly in the absence of his legal representatives. O. 22, r. 4, sub-r. (4) cannot have the effect of an *expost facto* validation of judicial proceedings passed in the absence of legal representatives of the dead party.

K. Venugopala Aiyangar for Petitioner.

K.S.

[F.B.]
The Chief Justice, Somayya and Patanjali Sastri, JJ.
18*th March*, 1941.

S.S.S. Chokkalingam Chettiar *v.* The Commissioner of Income-tax, Madras.
O.P. No. 204 of 1940.

Income-tax—Assessee having two mortgages over same property—Suit for principal and interest of only first mortgage, as security was barely sufficient for that, giving up claim in respect of the other mortgage—Right to deduction for bad debt.

The assessee had two mortgages in his favour, one for Rs. 40,000 and another for Rs. 10,850 in respect of the same property. In the year of account the assessee filed a suit for the principal and a fraction of the

interest due on the first mortgage giving up the claim on the second as the security was insufficient even for the first mortgage. The assessee claimed a deduction of Rs. 10,850 as bad debt. It was contended on behalf of the Crown that the two mortgages were in substance one transaction and the suit must be deemed to be one for the recovery of the principal due under both the mortgages and that the claim for deduction was premature.

Held, negativing the contention, that the assessee had in truth and in fact incurred a loss of capital of Rs. 10,850 which he was entitled to have deducted as a bad debt. The "substance of the matter" as distinguished from the strict legal position cannot be regarded in revenue cases.

K Krishnaswami Aiyangar and *T P. Gopalakrishna Aiyar* for Assessee.

K.V. Sesha Aiyangar for the Commissioner of Income-tax.

K.S.

[F.B.]
The Chief Justice, Somayya and Patanjali Sastri, JJ.
18th March, 1941.

Jamal Muhammad Sahib *v.* The Commissioner of Income-tax, Madras.
O.P. No. 308 of 1940.

Income-tax Act (*XI of* 1922), *S.* 4, *Cl.* 3 (1)—*Wakf—Provision for maintenance of the needy descendants of the donor—If for a charitable purpose and so exempt from assessment.*

A wakf *inter alia* provided for the maintenance and upkeep of such descendants of the donor in the male line, who might happen to be in poor and needy circumstances and unable to maintain themselves. The trustee of the wakf claimed exemption from assessment for the whole of the wakf property. The income-tax authorities allowed exemption for the share of income set apart for general charitable purposes, but declined to exempt the income allotted for the maintenance of the descendants of the donor. On a reference to the High Court,

Held, that in deciding whether there was a provision for charitable purposes the law to be applied was only the English law and according to the English law the provision for maintenance of the poor and needy descendants of the donor could not be construed to be for a charitable purpose as they were not of general public utility within the meaning of the Income-tax Act. Their Lordships answered the reference in favour of the Income-tax authorities.

B. Pocker and *K.T.M. Ahmed Ibrahim* for Assessee.

K.V. Sesha Aiyangar for the Income-tax Commissioner.

K.S.

Pandrang Row and King, JJ.
19th March, 1941.

Kandasami Chettiar and others *v.* Gokuldas Madanji & Co.
C.M.A. No. 342 of 1939.

Limitation Act (*IX of* 1908), *Art.* 182 (5)—*Decree transferred in August,* 1932, *to Bombay High Court for execution—Fresh application in February,* 1935, *to Court which passed the decree again for transmission to Bombay—Return of application on the ground that decree had not been received from Bombay—Re-presentation of same application in March* 1937—*If in time.*

A decree was obtained in November, 1925 in the Sub-Court, Ramnad and an order transmitting the decree to the High Court, Bombay for execution was passed in August, 1932. In February, 1935 the decree-holder

again applied to the Ramnad Sub-Court for transmission of the decree to the Bombay High Court for execution. The Ramnad Court returned that application with an order that the decree had not been received from the Bombay High Court. The decree-holder re-presented the application in March, 1937.

Held, that the order of the Ramnad Sub-Court in February, 1935 was itself a final order as nothing more had to be done by the decree-holder and the case was different from the returning of applications for remedying defects. Even though the transferee Court had not sent the decree copy the parent Court had jurisdiction to execute its decree and the application in February, 1935 having been made to the proper Court its representation was not barred by limitation.

K.S. Ramamurthy for Appellant.

T.K. Subramania Pillai for Respondent.

K.S.

Wadsworth, J.
20*th March*, 1941.

Sri Rajah Velugoti Venkatarajagopala Krishna Yachendra Bahadur Varu *v.* Kuram Venkataseshacharlu.
C.R.P. No. 1705 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 15 *and* 19—*Scope.*

Where a decree was passed by a Civil Court for payment of rent due to the landholder for Faslis 1340 to 1345 S. 15 of the Madras Agriculturists' Relief Act does not entitle the Collector to entertain an application for relief under that section by the tenant. S. 19 of the Act no doubt applies expressly to cases of decrees passed for repayment of a debt. But on the analogy of S 19 the Court has inherent power to apply the procedure prescribed by S. 19 to cases where a landholder obtains a decree for rent against the tenant. Under the guise of a scaling down application under S. 15 of the Act the tenant-judgment-debtor cannot circumvent the decree passed by a Civil Court. He must apply first under S. 19 to the Court which passed the decree and after getting the decree amended only he can obtain relief under S. 15 of the Act.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K.S.

Wadsworth, J.
21*st March*, 1941.

Narayanan Nambudripad *v.* Achuthan Nair.
C.R.P. Nos. 1638 and 1835 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 3, *Proviso D—Construction.*

A jenmi paying less than Rs. 500 as land revenue on his jenmam lands, but paying more than that amount in his capacity as a kanamdar of a ryotwari pattadar could not be an agriculturist under proviso D to S. 3 of Act IV of 1938.

Decision of *King, J.*, in (1940) 2 M.L.J. 934, followed.

K. Kuttikrishna Menon and *D. H. Nambudripad* for Petitioners.

P. Govinda Menon for Respondent.

K.S.

Wadsworth, J.
21st March, 1941.

Sri Rajah Sobhanadri Appa Row Bahadur, Zamindar of Telaprola *v.* Inuganti Venkatappayya Rao Bahadur.
C.R.P No. 2042 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 20—*Summary order in stay application deciding that applicant was agriculturist—How far* res judicata.

Plaintiff obtained in 1936 a decree for recovery of *kattubadi* against two mokhasadars. One of them applied under S. 20 of Act IV of 1938 before the District Munsif for stay of execution on the ground that by reason of a partition between the defendants the *kattubadi* payable by him became less than Rs. 100 and that therefore he was entitled to claim relief under the Act as an agriculturist and he then applied to the Sub-Collector for wiping off the decree debt by depositing in Court the *kattubadi* for fasli 1347 and the Sub-Collector passed an order in his favour under S. 15 (4) of the Act holding that he was bound by the decision of the Munsif under S. 20 that the debtor was an agriculturist. In revision,

Held, (*i*) that the order passed under S. 20 being of a summary nature was not *res judicata* in an application filed under S. 19 and an independent inquiry should be made as to whether the debtor was an agriculturist within the meaning of S. 19.

(*ii*) The proper Court to which an application under S. 19 should be made was the Civil Court which passed the decree and not the Sub-Collector's Court.

K. Umamaheswaran for Petitioner.

B. V. Ramanarasu for *V. Govindarajachari* for Respondent.

K.S.

The Chief Justice and Somayya, J.
21st March, 1941.

Sri Rajah Velugoti Venkatarajagopala Krishna Yechendra Bahadur Varu *v.* The District Collector, Nellore.
C.M.P. Nos. 6592 and 6593 of 1940.

Madras Estates Land Act (I of 1908), *S.* 186 (1) (a)—*Not applicable to* inams *excluded from the estate.*

In a petition for the issue of a *writ of certiorari* to quash the orders of the District Collector, Nellore, dismissing the petitioner's applications to grant certificates under S. 186 (1) (*a*) of the Madras Estates Land Act, for acquiring lands in the possession of minor *inamdars,*

Held, that S. 186 (1) (*a*) only applied to cases where a landholder of an estate desired to acquire any land which was part of an estate. Where the *inams* in question were pre-settlement *inams* enfranchised by Government and excluded from the estate the applications under S. 186 (1) (*a*) would not be maintainable.

P. V. Rajamannar, K. Subba Rao and *C.A. Vaidyalingam* for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*), *K. Umamaheswaran* and *N.C. Subbaiyya* for Respondents.

K.S.

The Chief Justice and Somayya, J. Satyanarayana
12th March, 1941. *v.* Anjareddi.
C.R.P. No. 832 of 1938.

Civil Procedure Code (*V of* 1908), *S.* 95—'*Plaintiff*', *if includes next friend of minor plaintiff.*

The Court has power to award against a 'plaintiff' reasonable compensation to the defendant for obtaining an order of arrest, attachment or temporary injunction under S. 94, C.P.Code, on insufficient grounds, or if it is found that there was no reasonable or probable ground for the institution of the suit. But where the suit is filed by the next friend of a minor plaintiff, the word 'plaintiff' in S. 95 cannot be read as including the next friend. The Court has no jurisdiction to order a next friend to pay compensation under S. 95. The injured party however is not prevented from instituting a suit to recover from the next friend compensation should he wish to do so.

P. Somasundaram and *P. Suryanarayana* for Petitioners.

A. Lakshmayya for Respondent.

K.S.

Pandrang Row and King, JJ. Ramachandra Reddiar
14th March, 1941. *v.* Adilakshmi Ammal.
A.A.O. No. 517 of 1938.

Practice — Decree merely rectifying an earlier decree—Executability.

A decree made in a suit which was one merely to rectify an earlier decree, by including certain properties which had been left out in such earlier decree, is not capable of execution though the decree in its rectified form has been reproduced in the later decree, especially where the original decree itself has been rectified as directed in the later decree.

S. Panchapagesa Sastri and *K.E. Krishnaswami Aiyar* for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J. Seshamma *v.*
14th March, 1941. Suramma and others.
C.R.P. No. 4 of 1940.

Court-Fees Act (*VII of* 1870), *Sch.* II, *Art.* 17 (b)—*Applicability—Suit for declaration of plaintiff's title to office of archaka, for delivery of the office and for injunction restraining defendants—Plaintiff's rights as holder—Emoluments attached to office—Whether makes the suit capable of valuation.*

A suit was filed for a declaration of the plaintiff's title to the office of archaka in a certain temple, for delivery of the said office to him and for an injunction restraining the defendants from interfering with the plaintiff's rights as office holder. The office of archaka carried with it certain emoluments. The lower Court ordered the plaintiff to carry out certain amendments to the plaint and pay an additional court-fee on the ground that as the office carried with it certain emoluments the right to the office cannot be regarded as incapable of valuation. On revision,

Held, that the court-fee payable on a plaint is to be determined with reference to the plaint as it stands. Any objection to the frame of the suit is not to be taken at the time of determining whether the court-fee paid on the plaint as it stands is correct or not. It may be, the plaint as framed for a mere declaration of right to office is not maintainable without a prayer for possession of the emoluments attached to the office. But if the plaintiff is prepared to take the risk there is no reason why he should be asked to amend the plaint and pay additional court-fee.

N R C

It cannot be said that merely because there are some emoluments attached to an office the claim for declaration of one's right to that office or for possession of that office is capable of valuation.

Karupanna Nadar v. *Mathalai Karuppa Nadar*, 1939 M.W.N. 720, applied.

T. Satyanarayana for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Government.

Respondents not represented.

K.S.

Wadsworth, J.
18th March, 1941.

Malyala Subba Rao *v.* Maharaja of Pithapuram.
C.R.P. Nos. 1157 of 1940 etc.

Practice — Party set ex parte — *Right to appear at later stage.*

The procedure known as '*setting ex parte*' is nothing more than a convenient method of indicating on the record that the party absent is not contesting and that the proceedings are to go on in his absence. It is open to him to make an appearance at a later stage provided that he is not in contempt for non-payment of costs or other penalty ordered, and to conduct his defence from that stage. But he has not the right when he has deliberately defaulted in doing what he was required to do and when the proceedings have gone on in his absence by reason of that default, to put the clock back and have the proceedings repeated with effect from the date of his default. On payment of the costs ordered he must be allowed to contest the proceedings from that stage.

V. Parthasarathi for Petitioner.

Ch. Raghava Rao for Respondents.

K.S.

Wadsworth, J.
20th March, 1941.

Markendeswaraswamy *v.* Satiraju.
C.R.P. No. 1838 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 20—*Scope.*

Under S. 20 of Act IV of 1938 the Court has to be satisfied that the applicant is entitled to the benefit of the Act. If on the materials adduced the Court is not so satisfied, the dismissal of the application would be the correct order.

R. Venkata Rao for Petitioner.

V. V. Chowdary, N. Kotiswara Rao and *A. Venkataswami* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
24th March, 1941.

Venkataratnam, Appellant.
S.R. Nos. 33204, etc. of 1940.

Madras Agriculturists' Relief Act (*IV of* 1938), *Rules under*—*R.* 9—*Court-fee payable on appeals against orders under r.* 9—*Court-Fees Act* (*VII of* 1870), *Sch. II, Art.* 11—*Applicability.*

The proper Article of the Court-Fees Act to apply to appeals against orders under r. 9 of the rules framed under Madras Act IV of 1938 (which provides for an application either by the debtor or by the creditor for a declaration as to the amount of the debt due)—is Art. 11 of Schedule II and the court-fee payable will be Rs. 2.

N. Narasimham, A. Lakshmayya, Y. Suryanarayana and V. Rangachari for Appellants.

The Government Pleader for Government.

K.S.

The Chief Justice and Somayya, J. — **In re Syed Gaffar Sahib.**
24th March, 1941. — **Crl.R.C. No. 273 of 1941 and Crl.R.P. No. 259 of 1941.**

Madras Prohibition Act (*X of* 1937)—*How far* ultra vires *the Provincial Legislature.*

In so far as the Prohibition Act is concerned with the possession of arrack manufactured in the Madras Presidency, there being no question of any import or export, the Provincial Legislature has the power to prohibit such possession. Therefore where a person has been found in possession of such liquor in the prohibited area, his conviction is lawful.

T. S. Venkataraman and *G. Venkatarama Sastri* for Petitioner.

K.S.

Wadsworth and Patanjali Sastri, JJ. — Km. Kr. Km. Kuppan Chetty *v.* Kaliammal.
24th March, 1941. — **A.S. No. 77 of 1941.**

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 8—*Mortgage by* A *to* B—*Purchase of properties by* B *from* C *and assignment of mortgages to* C *towards sale price*—C *assigning his rights to* D—*Suit by D against the heirs of* A *and alternatively against the heirs of* B—*Decree against* B*'s heirs only on the basis of covenants in the assignment deeds*—*Application by B's heir for scaling down*—*Nature of liability.*

A executed two mortgages for Rs. 2,000 and Rs. 1,000 respectively, in favour of *B* in 1921 and 1922. In 1928, *B* purchased certain properties from *C* and for a portion of the sale price assigned the mortgages executed by *A*, and also gave a covenant for indemnity. In 1935 *D*, an assignee from *C*, brought a suit against the heirs of *A* on the mortgages and alternatively against the heirs of *B* on the basis of the covenants. The suit as on the mortgages was dismissed but a decree was passed against the heirs of *B* for the amount which represented the balance of sale price for which the mortgages were assigned. In an application by one of the heirs of *B* for scaling down the decree debt,

Held, that the liability of the heirs of *B* could not be traced to the mortgages by *A*, but only to the assignment by *B*; and that the basis for scaling down the decree should not be the principal of the original mortgages by *A* but the amount for which the assignments were made by *B*.

R. Desikan for Appellant.

S. V. Venugopalachari for *N. Sivaramakrishna Aiyar* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. — Santhappa *v.* Sowrappa Holiappa Bulla
25th March, 1941. — **C.M.A. Nos. 424 and 425 of 1940.**

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 19—*Decree of Bombay Province transferred to Court in Madras Presidency for execution*—*Not liable to be scaled down.*

A decree passed by a Court in the Bombay Presidency transferred for execution to a Court in this province is not liable to be scaled down under Act IV of 1938. Proceedings under the Act for scaling down decree debts are not proceedings in execution under S. 47 of the C.P.Code.

B. Sitarama Rao and *Kasturi Seshagiri Rao* for Appellants.

V. S. Narasimhachar and *N. Appu Rao* for Respondent.

K.S.

Pandrang Row and King, JJ. 25*th March*, 1941.

Sivalingam Chettiar *v.* Subramanyam Chettiar and others. **C.M.A. No. 540 of 1938.**

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 90—*Creditor who had no order of attachment in his favour—Whether and when entitled to apply under O.* 21, *r.* 90.

A person who was the creditor of a judgment-debtor whose property has been sold in execution of another decree could apply under O. 21, r. 90 of the Civil Procedure Code although he did not obtain any order for attachment before judgment, provided he could prove to the satisfaction of the Court that his interests were adversely affected by the sale in question. On the evidence, it having been found that although there were other properties of the debtor besides those sold in execution there were also other creditors with large claims,

Held, that if the properties had been sold in execution for an undervalue the pecuniary interests of the applicant creditor would be adversely affected and therefore he could come in by an application under O. 21, r. 90, C.P.Code, to set aside the sale.

C.S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

K. Bhashyam Aiyangar and *P.J. Kuppanna Rao* for Respondent.

K.S.

[F.B.]

The Chief Justice, Somayya and Patanjali Sastri, JJ. 26*th March*, 1941.

The National Cycle Importing Co. by Proprietor Amritlal Bhaichand Shaw *v.* The Commissioner of Income-tax, Madras. **O.P. No. 24 of 1941.**

Income-tax Act (*XI of* 1922), *S.* 26 (2), *Proviso—Applicability.*

A firm carried on business with three partners up to the end of the samvat year 1994 (year ending with 23—10—1938). On 24—10—1938 two of the partners went out of the firm leaving the remaining partner as its sole proprietor. For the assessment year 1939-1940 (for accounting year samvat 1994), the Income-tax Officer determined the total income of the firm at Rs. 16,500 and assessed each of the 3 partners on the share to which each was entitled under the terms of the defunct partnership. The Commissioner of Income-tax revised the said order under S. 33 of the Act and held that the remaining partner must be assessed on the entire income of Rs. 16,500 under S. 26 (2) as a person "succeeding to the business of the firm." On a reference to the High Court whether the assessee could be assessed on the entire profits as successor under S. 26 (2) of the Indian Income-tax Act,

Held, that under the proviso to S. 26 (2) the successor can be taxed on the entire income only if the persons succeeded to cannot be found. As all the ex-partners were alive with known places of residence they cannot be deemed to be persons who could not be found. The assessment must therefore be distributed among the three partners according to their shares in the dissolved firm. The question whether "the succession" contemplated in S 26 (2) must have occurred in the year of account or not was left open.

T. S. Venkatesa Aiyar and *G. R. Jagadisan* for Assessee.

K. V. Sesha Aiyangar for the Income-tax Commissioner.

K.S.

Pandrang Row, J. Ratnammal *v.* Srinivasa Asari.
7th March, 1941. **C.R.P. No. 962 of 1939.**

Indemnity in sale deed—Limitation for enforcing—Cause of action when arises.

A covenant by the vendors of some land was in the following terms:— "We declare that there is no usufructuary mortgage or other mortgage created in respect of the said properties. Should there be any such burden we and our properties shall be liable to clear the same". In an action to enforce the covenant,

Held, that it was an express contract of indemnity to save the vendee from all loss in case any mortgage was found to be binding on the properties sold and Art. 116 of the Limitation Act was applicable and the cause of action commenced on the breach of the contract, which cannot be said to be complete till the property was actually brought to sale or till the sale was confirmed in enforcing the mortgages and the vendors were no longer in a position to save the property from the burden of the mortgages found to be existing.

K. S. Desikan for Petitioner.

N. R. Govindachari for Respondent.

K.S.

Pandrang Row and King, JJ. Venkatasubba Rao *v.* Papayya.
13th March, 1941. **C.M.A. No. 529 of 1938.**

Insolvency—Assignment by trader of his immovable property only—If assignment of "all his property" constituting an act of insolvency.

For the rule of law that—"if a trader assigns all his property except on contemporaneous payment, or, some substantial undertaking to make payment *in futuro,* that is an act of bankruptcy and is void against the creditors and the assignees"—to apply it must be shown that the trader has assigned all his property. Accordingly where the assignment is only of his immovable property and does not include movable property the rule does not apply.

19 Cal. 223 at 231 (P.C.), distinguished.

P. Somasundaram for Appellant.

T. Satyanarayana for Respondent.

K.S.

Pandrang Row and King, JJ. Narasimhamurthi *v.* Satyanandam and others.
14th March, 1941. **C.M.A. No. 547 of 1938.**

Charge—Decree directing a party to pay a certain amount and granting a charge "on all his property both movable and immovable"—Enforceability of the charge.

After removing a judgment-debtor from his office of trustee, the Court by its decree directed him to pay a certain amount with interest and also directed that all his property both movable and immovable should be charged for the amount due. In execution of that decree the charge was sought to be enforced. Rival decree-holders raised an objection that the charge was not enforceable in execution because the property charged was not specified.

Held, that the decree creating the charge was executable and was not void for uncertainty or on the ground that the property to which it relates was not specific.

T. Satyanarayana for Appellant.

B. V. Ramanarasu, P. Panini Rao and *M. S. Ramachandra Rao* for Respondents.

K.S.

N R C

Abdur Rahman, J.
17th March, 1941.

Venkataramana Chetti, Petitioner.

C.R.P. No 505 and C.M.P. No. 1722 of 1941.

Civil Procedure Code (*V of* 1908), *O.* 11, *r.* 12—*Interrogatories—Order requiring a party to state the result of his accounts—When proper.*

In allowing interrogatories to be administered the Court should go into the questions put to the defendant and determine if it would be proper in the circumstances to order him to state the result of his accounts. (1895) 1 Ch. 334, referred.

T. K. Srinivasa Thathachariar for Petitioner.

K.S.

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Wadsworth, J.
18th March, 1941.

Veeraswamy and another *v.* Venkatanarasimha Rayanim.

C.R.P. No. 123 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 23—*Applicability—Sale held under S.* 118 *of the Madras Estates Land Act—If can be set aside under S.* 23 *of Act IV of* 1938.

S. 23 of Act IV of 1938 has no application to sales other than sales in execution of a decree. Accordingly an order by a Deputy Collector which purported, under S. 23 of Act IV of 1938, to cancel a sale held under S. 118 of the Madras Estates Land Act, is without jurisdiction and is liable to be set aside.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *P. Somasundaram* for Petitioners.

P. V. Rajamannar and *M. Sriramamurthi* for Respondent.

K.S.

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Wadsworth, J.
19th March, 1941.

Rama Varma Valia Raja *v.* Kochayissa and others.

C.R.P. Nos. 840 to 850 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938) *S.* 15—*Applicability*—"Panaya Kychits"—*Persons indebted under—If entitled to relief under the Act—Debt due if* "rent" *under S.* 15 *of the Act.*

The general tenor of the *panaya kychit* in suit was to refer to a mortgage of land on which a theoretical rent was fixed and out of that rent, part was to go towards the interest on the mortgage, part towards the assessment and the balance was payable to the mortgagor. In an application to have the panayam amount scaled down,

Held, that S. 15 of the Act IV of 1938, does not apply and that the persons indebted under what are known as *panaya kychits* in Malabar are entitled to claim relief under the Act.

(1940) 2 M.L.J. 712, followed.

T. R. Venkatarama Sastri and *T. V. Rajagopalan* for Petitioners.

B. Pocker, K. P. Ramakrishna Aiyar and *C. Karunakara Menon* for Respondents.

K.S.

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Wadsworth, J.
19th March, 1941.

Kumaran and others *v.* Kunhunni Nair.

C.R.P. Nos. 1871 and 1872 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 15—"*Jenmi or intermediary*"—*Meaning.*

A *mel panayamdar* or assignee of the right to collect rent under a *panaya kychit* is not included in the definition of jenmi or intermediary in S. 15 of the Agriculturists' Relief Act.

T. R. Venkatarama Sastriar and *K. S. Sankara Aiyar* for Petitioners.

Respondents not represented.

K.S.

Wadsworth, J.
21st March, 1941.

Satyavathamma *v.* Mallikarjuna Rao.
C.R.P. No. 587 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (d)—Scope—Debt contracted on security of house property—If ceases to be such by reason of its discharging pre-existing simple money debt—Liability under personal covenant—If excluded.

It cannot be said that there is no debt 'contracted on the security of house property' merely because a mortgage discharged a pre-existing simple money debt. Nor can it be held that the liability comprised in the personal covenant embodied in a mortgage is a separate debt not contracted on the security of house property.

K. Kameswara Rao for Petitioner.

T. G. Krishnamurthi for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
24th March, 1941.

Kamanna *v.* Subramania Somayajulu.
C.R.P. No. 868 of 1939.

Madras Agriculturists' Relief Act (IV of 1938)—Assessment of debtor to profession-tax—Refusal of relief under the Act by lower Court—Subsequent suit and decree that assessment was invalid—If ground for interference in revision.

The Court below refused relief to the petitioner under Madras Act IV of 1938 on the ground that he had been assessed to profession-tax and was therefore excluded from the definition of 'agriculturist' Pending the revision petition against the order the petitioner filed a suit and obtained a declaration that the assessment was invalid and this declaration was relied on to prove that the petitioner was an agriculturist.

Held, that the order of the Court below being correct on the materials then available the subsequent declaration could not render it one passed without jurisdiction or materially irregular in the exercise of such jurisdiction.

P. Somasundaram for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Burn and Mockett, JJ.
24th March, 1941.

Naina Mohammad Rowther *v.* Periappa Rowther.
C.M.A. No. 272 of 1939.

Civil Procedure Code (V of 1908), O. 21, R 16—Scope.

An assignee of a decree applied for execution after his assignment was recognised in an earlier application. The debtor contended that the assignment was effected benami, that he had paid the amount to the original decree-holder, that it was arranged that the assignee should execute the decree against other defendants than himself and that whenever he required the assignee decree-holder to enter up satisfaction, he should do so. The lower Court rejected that plea *in limini* as the payment was not certified and therefore barred by O. 21, R. 2, Civil Procedure Code.

Held, such an arrangement cannot be recognised by any Court as it was opposed to O. 21, r. 16, Civil Procedure Code.

18 L.W. 453, distinguished.

K. Rajah Iyer and *K. S. Ramamurthi* for Appellant.

K. Bhashyam Ayyangar and *T. R. Srinivasan* for Respondent.

K.S.

Pandrang Row and King, JJ.
25th March, 1941.

Appalanarasimham *v.* Rajanna and others.
C.M.A. No. 67 of 1939.

Execution—Limitation—Money deposited to credit of decree-holder transferred to credit of another suit where decree-holder was judgment-debtor —Payment to attaching decree-holder—Whether "step-in-aid of execution to save limitation".

Certain costs which had been deposited in O.S. 45 of 1932, by the judgment-debtor were later on transferred to the credit of S.C. No. 309 of 1931 on the application of the appellant in execution of his decree in S.C. No. 309 of 1931. The money after being transferred to the account of S.C. No. 309 of 1931 (in which one of the judgment-debtors was the judgment-creditor in O.S. No. 45 of 1932), was paid to the appellant in execution of his own decree in S.C. No. 309 of 1931.

Held, that the payment to the appellant cannot be relied upon as a payment to the judgment-creditor in O.S. No. 45 of 1932, which would save limitation as a step-in-aid of execution of the decree.

I.L.R. 44 Mad. 971, distinguished.

K. Ramamurthi and *K. Someswara Rao* for Appellant.

V. Govindarajachari and *P. Satyanarayana Rao* for Respondent.

K.S.

Pandrang Row and King, JJ.
26th March, 1941.

Chidambaram Pandaram *v.* Lakshminarayana Chettiar.
C.M.A. No. 540 of 1939.

Civil Procedure Code (V of 1908), O. 21, R. 90—Security—When to be demanded by Court—Issue of notice to other side and hearing counsel for other side—If admission of petition.

Under O. 21, r. 90 the Court can demand security only before admitting the application to set aside a sale and not afterwards. Where notice has been ordered in the petition to set aside the sale and also in the petition to dispense with the security and the counsel for the other side was actually heard before orders were passed in both the petitions,

Held, that the issue of the notice is to be regarded as a step showing that the petition has been admitted and the actual hearing of the other side before passing orders makes the matter more certain. The fact that the Court did not intend to admit the petition does not affect the position and an order requiring security passed after that stage is one made without jurisdiction and must be set aside.

A. C. Sampath Aiyangar for Appellant.

C. D. Venkataramanan for Respondent.

K.S.

[F.B.]

The Chief Justice, Wadsworth and Somayya, JJ.
27th March, 1941.

The Secretary of State for India in Council represented by the Collector of Vizagapatam *v.* Allu Jagannadham.
S.A. No. 308 of 1938.

Madras Local Boards Act (XIV of 1920)—Order of surcharge by Examiner of Local Fund Accounts—Amount paid by President of Union Board—Suit for recovery after unsuccessful appeal to the Government—Jurisdiction of Civil Courts.

A person aggrieved by a surcharge order has one of two remedies open to him. He might either appeal to the Government against the order or he might apply to the principal Civil Court of Original Jurisdiction against the order.

Where the President of a Local Board sued, for recovery of monies paid by him under an order of surcharge by the Examiner of Local Fund Accounts, after his appeal to the Government against the order had been dismissed,

Held, that the plaintiff having elected one remedy could not again resort to the Civil Court for relief.

Held, further, that r. 6 framed under the Madras Local Boards Act, S. 199, sub-S. (2) providing remedy for persons aggrieved by a surcharge order was *intra vires*, the Local Government.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

B. Jagannadha Das for Respondent.

K.S.

The Chief Justice and Somayya, J.
28th March, 1941.

Ramalinga Aiyar *v.* Swaminadha Aiyar.
C.M.S.A. No. 71 of 1939.

International Law—Cochin subject — Change of domicil—Effect on jurisdiction of Cochin Court over the subject.

A Cochin subject does not lose his Cochin nationality by acquiring by birth British nationality and the Courts in Cochin have jurisdiction to pass a personal decree against such subject capable of execution in a British Indian Court.

B. Sitarama Rao and *S. Venkatachala Sastri* for Appellant.

T.M. Krishnaswami Aiyar and *C. K. Viswanatha Aiyar* for Respondent

K.S.

Pandrang Row and King, JJ.
31st March, 1941.

Rama Rao *v.* National Assurance Co., Ltd., Vizagapatam by its liquidator.
C.M.A. No. 21 of 1940.

Companies Act (VII of 1913*), S.* 280*—Order under—Whether appealable.*

No appeal lies against an order in an application under S. 280 of the Indian Companies Act. S. 202 of the Act does not confer a right of appeal against such an order as it applies only to orders made in winding up proceedings.

P. Somasundaram for Appellant.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent.

K.S.

Abdur Rahman, J.
31st March, 1941.

Bashyam Aiyangar (Petitioner).
C.R.P. No. 677 of 1941.

Civil Procedure Code (V of 1908*), O* 26*, rr.* 1, 4, 9*—Commission to examine witnesses residing within local limits of jurisdiction—Number of witnesses large—If ground for issuing commission.*

Where witnesses are residing within the local limits of the jurisdiction of the Court an application to issue a commission could not be granted unless it fell under either the one or the other of the rules (rr. 1 or 4 of O. 26, C. P. Code). The mere fact that there are a large number of witnesses is no ground for issuing a commission to examine them. O. 26, r. 9, which concerns issue of commissions for local investigation only has nothing to do with the examination of witnesses.

V. S. Rangachari and *M. C. Srinivasan* for Petitioner.

K.S.

Abdur Rahman, J. Bemraj Sowcar *v.* Mottayya Mudaliar.
31st *March*, 1941. S.A. No. 360 of 1938.

Practice—Plea of limitation—Not to be allowed to be raised for the first time in appeal—Limitation—Acknowledgment by joint family manager—How far binding on minors—Sale of mortgaged oil engine by an executing creditor—Mortgagee's rights over sale proceeds.

A manager of a joint Hindu family consisting of himself and his two step-brothers sold an oil engine to the appellant. In a suit for possession by the vendee the sale was held not binding on the shares of the step-brothers. The manager and the step-brothers who were minors represented by their mother executed a mortgage over the oil engine to the respondent. In other proceedings the engine was sold and the proceeds were brought into Court. The respondent filed a suit on his mortgage claiming the sale proceeds to the extent of the minors' shares and relied on an acknowledgment of liability on the part of the mother of the minors to save limitation. The appellant a creditor of the family who attached the engine pleaded that the suit was barred and also that the mortgage did not extend over the sale proceeds of the oil engine. The plea of limitation was raised only in the appellate Court.

Held, that (1) a point of limitation involving a mixed question of fact and law should not be permitted to be raised for the 1st time in appeal;

(2) an oil engine attached to the earth in a shed belonging to the same owner would be immovable property;

(3) a father or mother is a lawful guardian within the meaning of S. 21 of the Limitation Act and can extend the period of limitation by an acknowledgment in respect of a mortgage of joint family property even where there is a manager other than the father. I.L.R. 1940 Mad. 358 (F.B.), applied;

(4) in the case of mortgage of movable property the security extends to the sale proceeds of the hypotheca where the sale is not due to any default on the part of the mortgagee.

47 M.L.J. 704; I.L.R. 5 Mad. 830, distinguished.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

K. S. Sankara Aiyar and *T. V. Rajagopalan* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. Ramaswami Udayan and others
1st *April*, 1941. *v.* Ramanathan Chettiar (No. 2).
C.M.P. No. 996 of 1941.

Madras Agriculturists' Relief Act (IV of 1938)—Relief under—Leave to appeal to the Privy Council—Valuation of appeal—Civil Procedure Code (V of 1908), Ss. 109 *and* 110.

An application for relief under the Agriculturists' Relief Act and for entering up satisfaction of a decree for Rs. 10,000, was refused by the District Judge and an appeal therefrom to the High Court [(1941) 1 M.L.J. 6] was also dismissed as infructuous by reason of the supersession of the original decree by an appellate decree passed after the passing of Act IV of 1938. In an application for leave to appeal to the Privy Council,

Held, that the scope of relief under the Act was the determining factor and as the principal amount of the debt Rs. 3,200 could not be scaled down the same ought to be excluded in computing the value of the appeal.

The contention that there was no right of appeal to the Privy Council as an order on an application to scale down a decree is not appealable, was not gone into.

N. Sivaramakrishna Aiyar for Petitioners.

K. S. Ramabhadra Aiyar for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
2nd April, 1941.

Arumugam Chettiar *v.*
Nagaswami Aiyar.
C.M.A. No. 364 of 1939.

Surety bond—Construction—S. 145, Civil Procedure Code—Applicability—Proper remedy against surety—Separate suit if necessary.

X, a third party executed a surety bond to the Additional Sub-Judge, Madura in the following terms:—"If the said A.S. No. 406 of 1930 in the High Court results favourably to the plaintiff my under-mentioned property will be answerable for Rs. 2,253. If the said property is not sufficient, myself, my heirs and administrators and my other immovable and movable properties shall remain bound."

On the appeal (No. 406 of 1930) resulting favourably to the plaintiff he sought to enforce the security bond by applying for the arrest of the surety and it was held by the High Court in C.M.A. No. 411 of 1936 that the properties alone should be proceeded against.

An application was then made by the decree holder for restitution for costs and for enforcement of the security bond against *X* and his sons, as well as the principal debtor; and it was ordered by the lower Court. On appeal, it was urged on behalf of the sons of the surety that the security bond did not impose any personal liability on the appellant or his father; that S. 145, C.P.Code, had no application to the case and as the bond was in favour of the judge and not merely of the Court it should be assigned to the party and sued upon and that the proper remedy was only by way of suit.

Held, (*i*) that the construction of the bond in the earlier proceedings (C.M.A. No. 411 of 1936) was conclusive between the parties in the present proceedings;

(*ii*) that S. 145, C.P.Code, had no application to the case; and

(*iii*) that the proper remedy was only by way of suit after getting the bond assigned over to the decree-holder.

K. S. Ramabhadra Aiyar for Appellant.

B. Sitarama Rao and *O.V. Baluswami* for Respondent.

K.S.

Pandrang Row and King, JJ.
2nd April, 1941.

The Official Receiver of East Tanjore,
v. Rangaswami Iyengar and others.
C.M.A. No. 142 of 1939.

Execution—Decretal portion of order—If can be gone behind in confirming the sale in execution—Practice—Appeal—Preliminary objection—When to be raised.

In execution of a decree for money, properties comprised in lots Nos. 4, 9, 10, 11, 12, 13 and 15, were sold on 21st January, 1935. An application to set aside the sale under O. 21, r. 90, Civil Procedure Code, was filed. Therein reference was made to the sales held on 21st January, 1935, but in the body of the application, reference to lot No. 13, was omitted by mistake. The Court set aside the sales held on 21st January, 1935. However, in the view that there was no reference to lot No. 13 in the application the sale was confirmed in respect of that lot. The appellant representing the judgment-debtor applied to set aside the confirmation order. That was rejected on the ground that the sale of lot No. 13, was not set aside. On appeal,

Held, that the decretal portion of the order referred to the sales on 21st January, 1935, which included lot No. 13, as well, and the Court could not go behind that and confirm the sale on the footing that the sale was not set aside. The confirmation order was without jurisdiction.

(2) It has been a practice of this Court that whenever a question as to the maintainability of the appeal is sought to be raised, that should be done preliminarily and not after the appeal on the merits is argued.

K. Bhashyam Ayyangar and *T. R. Srinivasan* for Appellant

Ch. Raghava Rao for Respondent.

K.S.

Wadsworth, J.
4th April, 1941.

Naranappa Naicker *v.* Krishnaswami Naicker.
C.R.P. No. 2274 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 9 (1), *proviso—Omission of words "in favour of the same creditor"—Effect.*

Where a promissory note executed before the 1st October, 1932, in favour of *A* is renewed in 1936, in favour of *B*, the debtor is not entitled to have the debt scaled down under S. 8 as a debt incurred before 1—10—1932. The debt can only be scaled down under S 9, as the promisees under the promissory notes are different and there is no renewal "in favour of the same creditor." The omission of these words in the proviso to S. 9 (1) does not entitle the debtor to have the debt scaled down under S. 8, as it has been held that there can be no renewal unless the parties to the two promissory notes are the same. (1940) 2 M.L.J. 664; (1940) 2 M.L.J. 517; *Barber* v. *Mackell*, 68 L.T. 29, followed.

P. S. Narayanaswami Aiyar for Petitioner.

V. Seshadri and *V. Ramaswami* for Respondents.

K.S.

Wadsworth, J.
4th April, 1941.

Sivanarayana *v.* Satyanarayana.
C.R.P. No. 2253 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *Ss.* 15 *and* 19—*Relief under S.* 15—*Absence of provision for procedure in the Act—Proper procedure.*

An agriculturist tenant against whom a rent decree had been passed deposited the rent for fasli 1347 and filed an application to the Deputy Collector under S. 15 of Act IV of 1938 for relief. The landholder contended before the High Court in revision, that unless an application under S. 19 of the Act is filed and the decree amended the tenant cannot have relief under S. 15. For amending a Revenue Court's decree for rent there is no provision in the Act, S. 19 being applicable only to decrees for repayment of debts.

Held, that it is advisable for the Revenue Courts to amend the decree and grant relief under S. 15 by treating the application as analogous to an application under S. 19, and as in the present case the decree was of the same Court there was no prejudice caused to the landholder and there was no ground for interference in revision.

N.V.B. Sankar Rao for Petitioner.

A. Lakshmayya for Respondent.

K.S.

The Chief Justice and Somayya, J.
18th March, 1941.

Devarajulu Naidu *v.*
Jayalakshmi Ammal.
C.C.C.A. No. 79 of 1939.

Limitation Act (*IX of* 1908), *Arts.* 62 *and* 120—*Applicability.*

On 9th January, 1931 two brothers *A* and *B* sold certain immovable properties to one *K* for Rs. 3,000 and in part discharge of the purchase consideration *K* executed a promissory note for Rs 1,500 in favour of *C* the wife of *A*. *C* quarrelled with *A* whom she eventually left. On 5th November, 1931 *C* fraudulently endorsed the promissory note to one *D* without consideration with the object of defeating *A* and *B*. In 1932, *D* filed a suit against *K* on the promissory note and on 19th July, 1933 he obtained a decree for Rs. 1,653-8-0 The decree was set aside on appeal and the suit was remanded for taking fresh evidence on 9th August, 1934. A new decree for Rs. 1,653-8-0 after further hearing was passed on the 26th November, 1934.

A and *B* filed the present suit on 26th November, 1937 to recover from *C* and *D* the Rs. 1,653-8-0 which *D* had recovered from *K*. On the question of limitation,

Held, that the real claim was against *D* in whose hands were the moneys paid by *K* in discharge of the promissory note. In endorsing the note C wrongly converted it and as *D* took it with full knowledge of the facts he acquired no title to it. The suit was in time as there was an equitable claim which came within Art. 120, and Art. 62 of the Limitation Act was not applicable. *C* was a trustee for *A* and *B* who were entitled to trace the proceeds of the properties in the hands of D.

V. T Rangaswami Aiyengar and *P Krishnamachari* for Appellants.
Srinivasaraghavan for Respondent.

K.S

Pandrang Row and King, JJ.
25th March, 1941.

Veeraswami *v.*
Namayya and others.
A.A.O. No 70 of 1939.

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 93—*Application for refund of poundage and interest on the purchase money—Limitation.*

The auction purchaser filed an application under O. 21, r 93, C.P. Code for refund of the poundage and interest on the purchase money, the actual purchase money having been recovered by him through Court on an earlier occasion. The decision of the first Court setting aside the sale was carried up to the High Court in appeal by not only the auction purchaser but also by others, and the appeals were disposed of only on 6—10—1937, though the original order setting aside the sale was on 15—11—1934.

Held, that the date of the appellate Court's decree must be taken as the starting point for limitation

K. Kameswara Rao for Appellant.

Respondent not represented.

K.S.

Wadsworth and Patanjali Sastri, JJ
25th March, 1941

Gopala Maller *v* Vallithoduvayil Velloth Krishnan
C.R.P. No. 250 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *S* 19—*Execution in* 1933, *of a fresh promissory note by* C *along with* A *in satisfaction of decree against* A *and* B *resulting from their prior debt incurred before* 1932—*Scaling down.*

N R C

A and *B* were indebted under a contract which was anterior to 1932. The debt ripened into a decree in 1933, to discharge which a fresh promissory note was executed by *C*, who was not concerned in the earlier debt, along with *A*. *A* and *C* being agriculturists applied under S. 19 to scale down the debt and the lower Court scaled down the debt as against both *A* and *C* on the basis of its being a renewal of the original liability. On revision,

Held, that the basis of scaling down was correct as far as the liability of *A* was concerned, but as against *C* who was not established to be a surety but was jointly and severally bound to pay the amount in consideration of the satisfaction of the decree debt against *A* and *B*, the plaintiff was entitled to a decree on the suit promissory note with interest at 5 per cent. from the date of the note to 22nd March, 1938, and thereafter at 6 per cent. and proportionate costs

(1940) 2 M.L.J. 517, (1940) 2 M.L J. 786 and C.R.P. No. 1905 of 1940, referred to.

O. T. G. Nambiar for Petitioner.

P. Govinda Menon for Respondents.

K.S.

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ.
8th April, 1941.

Thiruvengada Mudaliar v. Rajabathar Mudaliar.

L.P.A. No. 18 of 1940.

Hindu Religious Endowments Act (XX of 1863)—Devasthanam Committee created under—Appointment of trustee by—If can be for a term of years or must be for life—Trustee—Whether servant of the Committee.

The Devasthanam Committee of Madras appointed under the Hindu Religious Endowments Act has an unfettered discretion, subject to the special conditions of particular endowments to appoint a trustee for a term of years if it considers that it should be so in the interests of any particular trust.

So far as Madras is concerned it is settled by authorities that a trustee is not a servant of the committee.

Case-law discussed. Decision of King, J., in (1940) 2 M.L.J. 5, affirmed.

N. Sivaramakrishna Aiyar and *A. Venkatasubbu Mudaliar* for Appellant.

N. Srinivasa Aiyangar amicus curiae.

K.S.

Gentle, J.
15th April, 1941.

Thimmappa Chettiar v Thangavelu Chettiar and another.

S.A. No. 693 of 1938.

Practice—Costs—Assignee from decree-holder impleaded in appeal, actively supporting lower Court's decree—Liability for costs of appeal and of trial.

Where the assignee of a money-decree who was made a party in an appeal against the decree by the defendant, actively supported the decree, an order directing him to pay to the defendant who succeeded in the appeal not merely his costs of the appeal but also of the trial will not be improper.

21 Bom. 167, applied.

K. V. Ramachandra Aiyar and *S. Tyagaraja Aiyar* for appellant.

S Venkataraman for Respondent.

K.S.

Abdur Rahman, J.
24th March, 1941.

Namburi Subbayya *v.* Namburi Pitchayya, minor by guardian, Chagandrati Chandrayya.
S.A. Nos. 41 and 42 of 1937.

Hindu Law — Stridhanam — Inheritance — Illegitimate daughters of Brahmin widow—Preference over illegitimate sons.

The illegitimate daughter of a Brahman widow is entitled to succeed to her mother's stridhanam properties in preference to her illegitimate sons. 21 Mad. 40, relied on.

There is nothing in principle to draw any distinction between the status of degraded women whether they belonged to one caste or other, at least so far as the right to inherit their stridhanam property is concerned.

B. V. Subrahmanyan for Appellants.

T. Thyagaraja Aiyar for Respondents.

K S.

Pandrang Row and King, JJ.
26th March, 1941.

Rudrai Goundan *v.* Karitthirumа Goundan.
A.A.O. No. 562 of 1938.

Guardianship — Guardian of person — Paternal grandmother and maternal grandmother—Preference.

There is no rule of law that the maternal grandmother should be preferred and even from the point of view of human nature it is impossible to say that the maternal grandmother is always to be presumed to be a more suitable guardian of a minor's person than the paternal grandmother. The fact that the minor's father was in jail, undergoing a sentence for the murder of his wife, that is, the minor's mother, does not affect the question in the absence of any allegation that the parents of the man in jail had anything to do with the murder, either before or after the event.

T. R. Srinivasan for Appellant.

D. Ramaswami Aiyangar, T. P. Kannabhiran, M. V. Gopalaratnam and *R. Visvanathan* for Respondents

K.S.

The Chief Justice and Mockett, J.
1st April, 1941.

Loomchand Sait *v.* Official Liquidator, Indo-Carnatic Bank, Ltd.
O.S.A. No. 58 of 1940.

Indian Companies Act (*VIII of* 1913)—*Rules framed under r.* 60 (1) —*Power of Court to extend time—When to be exercised.*

The appellant's name having been placed in the list of contributories, the appellant challenged the right of the Official Liquidator to do so. When the case was called the liquidator took the preliminary objection that the application was out of time. On the question of the Court's power to extend the time,

Held, that the Court can extend time only when real and sufficient grounds are shown for the order and the appellant having failed to show such reason his petition must be dismissed.

K. Rajah Aiyar and *A. V. Narayanaswami Aiyar* for Appellant.

S Srinivasaraghavan for Respondent.

K.S.

Pandrang Row and King, JJ.
1st April, 1941.

Official Receiver, East Tanjore at Negapatam *v.* Lakshmanan Chettiar.
A.A.O. No. 77 of 1939.

Civil Procedure Code (*V of* 1908), *O.* 21, *r.* 90—*Waiver of right to fresh proclamation—Whether waiver of objection to irregularities in the proclamation.*

N R C

The judgment-debtor on his formally giving up his right to have a fresh proclamation obtained adjournments of the execution sale. There were some irregularities in the proclamation in the shape of extremely inadequate upset prices fixed and omission to state material particulars.

Held, that it was not open to the judgment-debtor or the Official Receiver who succeeded in his place to rely on the irregularities and defects in the sale proclamation by reason of the waiver of a fresh proclamation which necessarily implied waiver of objections to any defect appearing on the face of the sale proclamation. 48 L.W. 199 : (1939 1 M.L.J. 147 (P.C.), followed.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

S. Panchapagesa Sastri, *K. R. Krishnaswami Aiyar* and *R. Ramamurthi Aiyar* for Respondent.

K.S.

Pandrang Row and King, JJ.
3rd April, 1941.

Dayananda Mudaliar
v. Provincial Government of Madras.
A.O. No. 195 of 1939.

Civil Procedure Code (*V of* 1908)—*Practice* — *Decree in suit instituted in* forma pauperis—*Plaintiff to pay a larger sum to defendant than what plaintiff had to receive from defendant—Effect on right of Government to execute for its costs.*

In a suit in *forma pauperis* the decree directed the plaintiff to pay Rs.502-7-0 to the Government for court-fees due to it and made it a first charge on the amount decreed to the plaintiff. The decree allowed to the plaintiff Rs. 63, and Rs. 7 as costs (Rs. 70 in all). On the other hand the plaintiff was ordered to pay the defendant Rs. 360 for proportionate costs with interest.

Held, that in the circumstances the defendant could not be legally deprived of the right to set off and the application by the Government for execution should have been dismissed *in limine* on the ground that the so-called charge covered a minus quantity.

K. Y. Adiga and *S. Ramayya Naik* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Wadsworth, J.
3rd April, 1941.

Muthu Goundan *v.*
Velappa Goundan.
C.R.P. No. 2201 of 1939.

Madras Agriculturists' Relief Act (*IV of* 1938), *Ss.* 3 (ii) (a) *and* 23 —*Mortgagor continuing in possession after sale of the hypotheca in execution of mortgage decree—Whether "agriculturist" entitled to benefits of the Act.*

There may possibly be cases in which a person in possession who is unable to prove a full title might be held to have a saleable interest in the property. But in a case where the whole of the right, title and interest of the mortgagor had already been sold in execution of the mortgage decree and the mortgagor still retains possession of the property it cannot be held that the mere possession of the mortgagor in the interval between the sale and the delivery of the property could amount to a "saleable interest" in the property. To qualify a person as "agriculturist" under Act IV of 1938 there should be at least some degree of title which the holder thereof could convey to somebody else and a mere squatting on the land after the owner's title has passed cannot amount to such saleable interest sufficient to qualify the squatter for the benefits of the Act.

T. Krishna Rao for Petitioner.
K. Sankara Sastri for Respondent.
K.S.

Burn and Mockett, JJ.
4th April, 1941.

Ramaswami Reddiar *v.*
The Official Receiver of
South Arcot and another.
C.M.A. No. 264 of 1939.

Provincial Insolvency Act (V of 1920), S. 68—Sale of insolvent's property by auction—Subsequently circularising creditors inviting higher bids—Propriety—Cause of action for applying under S. 68—When arises.

After due advertisement the insolvent's properties were sold by the Official Receiver to the appellant for Rs. 118 on 18—8—1937 when a portion of the purchase price was paid. The balance was paid on 18—9—1937, the sale confirmed on 11—11—1937 and the sale deed executed on 6—5—1938. The respondent had offered to purchase the properties for Rs. 120 and deposited the amount with the Official Receiver on 16—2—1938. The Official Receiver then directed notices to the creditors returnable on 14—10—1938 to show why the higher offer should not be accepted. On the return date the Receiver stated that the properties had already been sold on 7—7—1938. The respondent filed a petition to the District Court to set aside the sale. The sale was set aside by the District Judge on the ground of certain irregularities with regard to the confirmation of sale. On appeal,

Held, that the procedure with regard to the sale of such properties was imperfect, the practice of circularising creditors inviting higher bids after the auction was held, should be condemned, for persons would not come forward and bid at the public auction, if the highest bid was not to be accepted.

Held, further, that the cause of action for filing a petition to modify, cancel or reverse an order of the Official Receiver arose on all the dates connected with the sale.

A. S. Srinivasa Ayyar and *S. Seshadri* for Appellant.
K. Venkataraghavachariar for Respondent.
K.S.

Pandrang Row, J.
8th April, 1941.

Achayya *v.* Venkatanarasamma.
C.R.P. Nos. 772 and 773 of 1940.

Civil Procedure Code (V of 1908), O. 44, r. 1, proviso—Applicability of proviso—If can be considered after notice is issued to respondent.

In deciding petitions for leave to file appeals in *forma pauperis* once notice to the respondent goes, it is no longer open to the judge who orders notice and of course to his successor to reconsider the question whether the proviso to O. 44, r. 1 would apply, it being presumed in the circumstances that before issuing notice the question of the applicability of the proviso was considered and decided in the negative. I.L.R. 58 Mad. 982, followed.

A.I.R. 1931 Pat. 188 (F.B.), referred to.

Ch. Raghava Rao for Petitioner.
N. Narasimham for Respondent.
K.S.

Pandrang Row, J.
9th April, 1941.

Venugopala Mudaliar *v.*
T.V.R. & Co., by managing partner.
C.R.P. No. 1473 of 1940.

Madras Debt Conciliation Act (XI of 1936), Ss. 9 and 25—Dismissal of petition under S. 9—Restoration—If revives stay under S. 25.

Where a dismissal of a petition was under S. 9, neither that section nor any other section in the Act contemplates the cancelling of an order of such dismissal and restoration of the petition to the file. The stay under S. 25 can apply only once to the same debt and the restoration of the petition cannot restore the stay which also came to an end when the application was dismissed by the Board under S. 9 of the Act.

P. B. Ananthachariar for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J
9th April, 1941.

Ramamma *v.* Subba Reddi.
C.R.P. Nos. 92 and 103 of 1941.

Civil Procedure Code (V of 1908), *O.* 32, *r.* 15—*Scope and applicability—Finding under Lunacy Act that a person was not a lunatic—Effect.*

The definition of a "lunatic" in the Lunacy Act is different from the requirements prescribed under O. 32, r. 15, C.P.Code. Under the Lunacy Act a lunatic is defined as an idiot or a person of unsound mind, whereas under the language used in O. 32, r.15 he is "a person who is either adjudged to be of unsound mind or a person, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interest when suing or being sued". Accordingly when an application is made under O. 32, r. 15, C. P.Code, it cannot be held that it does not lie without holding any enquiry merely because it has been held in proceedings under the Lunacy Act that the defendant was not a lunatic.

P. Chandra Reddi for Petitioner in C.R.P. No. 92 of 1941 and for Respondent in C.R.P. No. 103 of 1941.

Ch. Raghava Rao for Respondent in C.R.P. No. 92 of 1941, *C. A. Vaidyalingam* and *T. Venkatadri* for Petitioner in C.R.P. No. 103 of 1941.

K.S.

The Chief Justice and Somayya, J.
16th April, 1941.

Kurivella Subba Rao *v.*
Kavi Satyanarayanamurthi and
Debt Conciliation Board, Rajahmundry.
C.M.P. No. 7312 of 1940.

Madras Debt Conciliation Act (XI of 1936), *S.* 10 (1)—*Creditor filing statement—Board calling for accounts—Order discharging the debt for failure to produce account—Propriety.*

A creditor while filing his statement of debt giving particulars stated that the account books were filed in Court in connection with a suit. On the adjourned date as the creditor was still unable to produce the account books and absented himself the Board passed an order discharging his debts. In an application to quash the proceedings,

Held, that the Board had no jurisdiction to discharge the debt when the creditor complied substantially with the provisions of S. 10 (1) of the Act. The failure of the creditor to produce his account books did not warrant the Board to pass such a confiscatory order. The order should be quashed. The Board was directed to pay Rs. 200 as costs.

M. S. Ramachandra Rao for Petitioner.

M. Appa Rao for Respondent.

The Debt Conciliation Board not represented.

K.S.

Wadsworth, J. 27*th March*, 1941.

Thirumala Rao *v.* Kasturichand Hanumandas Firm
A.A.O. No. 23 of 1940 converted into C.R.P. No. 536 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Mortgage—Final decree for sale—Whether decree for repayment of a debt.

The language of S. 19 of Act IV of 1938 is wider than that of O. 21, r. 16, C.P.Code, and a final decree which directs the sale of the hypotheca and the payment of the proceeds to the mortgagee is a decree for the repayment of the mortgage debt which can be scaled down. 49 Mad. 508, distinguished.

P. Satyanarayana Rao and *M.S. Ramachandra Rao* for Petitioner.

V. Rangachari for Respondent.

K.S.

Pandrang Row and King, JJ. 1*st April*, 1941.

Muthukumaraswami Mudaliar and others *v.* The Official Liquidator of the Coimbatore Pasupathi Bank, Ltd.
A.A.O. No. 389 of 1940.

Indian Companies Act (VII of 1913), S. 246—Rules framed by Madras High Court—Whether applicable to proceedings before the District Court to which further proceedings for and in liquidation are transferred.

There is no reason why the rules framed by the Madras High Court under S. 246 of the Indian Companies Act, which *prima facie* are meant to be in force only in respect of proceedings in the High Court should be regarded as applicable to the procedure to be followed in the District Court, to which subsequent proceedings for and in the winding up were transferred by the High Court which made the liquidation order.

P. V. Rajamannar, K. Subba Rao and *C. A. Vydialingam* for Appellant.

C. S. Swaminathan for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ. 3*rd April*, 1941.

Nagarajan (Minor by guardian) *v.* Krishna Aiyar.
A.A.O. No. 403 of 1939 converted into C.R.P. No. 775 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Applicability—Mortgagor assigning his rights subject to another usufructuary mortgage after the filing of a suit on the simple mortgage—Final decree and sale of some items of property in execution—Right of mortgagor and usufructuary mortgagee to have sales set aside under S. 23.

A suit on a simple mortgage executed on 17-5-1928 was filed in 1934 and while the suit was pending the mortgagor sold the equity of redemption to the 8th defendant subject to a usufructuary mortgage in favour of the 6th defendant. The preliminary decree was passed on 7—3—1935. Subsequently there was a final decree and certain items of the hypotheca were sold before Act IV of 1938 came into force. On 17—11—1937 the decree-holder bought to sale two items of the hypotheca, which he purchased himself on 20—6—1938. The mortgagor applied under S. 23 of Act IV of 1938 to set aside the sale of 20—6—1938.

Held, that the most the mortgagor could get by redeeming the mortgage would be a right to the return of the mortgage deed with an endorsement of discharge and the delivery of the title deeds of the land, which he would then have to hold as a trustee for his vendee. Such right does

not connote an interest in the property sufficient to satisfy the first clause of S. 23 of Act IV of 1938. 44 Mad. 554, distinguished. But the usufructuary mortgagee who was impleaded as the 6th defendant, if not otherwise disqualified, may be entitled to claim relief under the Act.

K. V. Sesha Aiyangar for Appellant.

T. K. Sundararaman for Respondent.

K.S.

Wadsworth, J.
4th April, 1941.

Dorayya and others *v.* Satyanarayana and others.
C.R.P. No. 2225 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 4 (h)—*Scope.*

A debt was originally due to a man who died during the pendency of a suit thereon and his widow was impleaded as his legal representative and a decree was passed in her favour. On 21—12—1935 this lady transferred her decree to the first respondent. The deed of transfer recited that the transferor will, if there be any obstruction at the time of the recovery of the decree debt, clear such obstruction at her own expense. The transfer was ultimately recognised by the Court on 6—2—1937 after which date the transferee alone became entitled to execute the decree. The District Munsif held that by reason of the indemnity for costs, the lady continued to be interested in the decree debt and S. 4 (*h*) was applicable. On revision,

Held, that after recognition of the transfer by the Court so far as the judgment-debtor was concerned the only person to whom the debt was payable was the transferee and the transferor ceased to have the right to recover anything from the judgment-debtor. S. 4 (*h*) of Act IV of 1938 had no application in the circumstances.

P. Somasundaram for Petitioner.

P. Satyanarayana Raju, M. R. Raju and *S. Venugopal Rao* for Respondents.

K.S.

King, J.
7th April, 1941.

Ranganathan Chettiar *v.* Subramaniam Chettiar.
C.R.P. No. 622 of 1940.

Madras Debt Conciliation Act (XI of 1936), *Ss.* 9 *and* 25—*Dismissal of application for conciliation with permission to file fresh petition—Fresh petition in pursuance—Stay of execution of decree—If can again be granted.*

In dismissing an application for conciliation after it was pending for eight months the Board granted in its order liberty to apply again. It was contended that a fresh application filed in pursuance of the liberty must be treated as a restoration of the previous application and that therefore the debtor was entitled to obtain again an order for stay of execution of his decree.

Held, that the distinction between S. 7 and S. 9 would make the permission granted by the Board to apply again, one which the Board had no jurisdiction to grant. Even if the two applications are treated as one, where more than one year has passed without conciliation being effected the petition must be dismissed. Therefore the debtor cannot obtain again a stay of execution of the same decree.

B. K. B. Naidu for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Pandrang Row, J.
8th April, 1941.

Bindu Madhava Rao *v.* Subba Reddi.
C.R.P. No. 755 of 1940.

Madras Debt Conciliation Act (XI of 1936), S. 10 (3)—Order of Board discharging debt due to a creditor for failure to file statement of debts within two months of notice—Application to District Court to revive debt—Limitation—Starting point.

An application to revive a debt should be filed within two months of the order declaring the debt to be discharged and not from the date of notice to him calling for statement of his debts. An application within two months after he became aware of the passing of the order discharging his debt will be in time.

P.V. Rajamannar, K. Subba Rao and *M. Srinivasa Rao* for Petitioner.

P. Chandra Reddi for Respondent.

K.S.

Pandrang Row, J.
9th April, 1941.

Govindaswami Naicker *v.* Javanmull Sowcar.
C.R.P. No. 986 of 1940.

Practice—Ex parte *decree—Application to set aside—Sufficient cause established—Conditions, if can be imposed in setting aside the decree——Practice—Personal knowledge of judge—Decision when can be based on.*

Where sufficient cause has been established for defendant's absence when the case was called on, the defendant is entitled to have the *ex parte* decree against him set aside. It is not a matter of privilege or indulgence and it is not proper to order the defendant to deposit the full amount of the decree in Court as a condition.. The *ex parte* decree must be set aside without any condition being imposed.

In no case is it desirable that a decision should depend on the personal knowledge of the Judge himself as regards a matter of fact which is not peculiarly within his knowledge.

S. Krishnamachariar and *K. Subba Rao* for Petitioner.

V. S. Arunachalam for Respondent.

K.S.

Wadsworth, J.
9th April, 1941.

Hanumantha Rao *v.* Basavayya.
A.A.O. No. 38 of 1938 converted into C.R.P. No. 756 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 20—Dismissal of application under S. 20 for stay—Application under S. 19, if to be made within 60 days of order under S. 20.

The dismissal of a stay application for default can only have the effect of deciding that no stay under S. 20 of Act IV of 1938 is to be granted. That is no bar to an application under S. 19 filed after 60 days, as the statutory period of limitation under S. 20 only applies when a stay has been granted.

K. Kameshwara Rao for Petitioner.

V. Govindarajachari for Respondent.

K.S.

Wadsworth, J.
16*th April*, 1941.

Kailasanatha Naigar *v.* Natesan Chettiar.

C.R.P. No. 355 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), *S.* 19—*Applicability —Order under S.* 151, *C. P. Code, fixing amount due in restitution—If governed by S.* 19 *of Act IV of* 1938.

Though an order under S. 151, C.P.Code, which determined the precise amount due in proceedings for restitution, may not be technically speaking a decree it was certainly a final adjudication of the amount payable by the petitioner to the respondent which could only be modified by some procedure known to law. In the case of such an order a procedure analogous to that in S. 19 of Act IV of 1938 should be applied. When such final adjudication took place after Act IV of 1938 came into force and the person liable to pay failed to apply for relief under the Act at a time when it was available to him he cannot be heard to put it forward at a later stage as a reason for modifying the order.

S. Rajaraman and *S. Kothandarama Nayanar* for Petitioner.

M. Krishna Bharathi for Respondent.

K.S.

Burn and Horwill, JJ.
24*th April*, 1941.

Ratnavelu Achari *v.*
Sheik Dawood Rowther.
R.C. No. 9 of 1941.

Civil Procedure Code (*V of* 1908), *O.* 46, *r.* 1—*Reference to High Court—When to be made.*

The only cases in which a reference may be made to the High Court under O. 46, r. 1 of the C.P.Code, are suits or appeals in which the decree is not subject to appeal. Where the decree which will be passed in the suit will be appealable a reference to the High Court will be incompetent.

K.S.

Mockett, J.
24*th April*, 1941.

Ayyar and Co. *v.* Rex.

Crl.R.C. No. 1100 of 1940, etc.

Madras District Municipalities Act (*V of* 1920), *S.* 306, *clause* (28)—*Power of Municipal Council to make bye-laws for prohibition and regulation of advertisement in public streets and parks—If includes power to levy licence fee for advertisements.*

S. 306, cl. (28) of the Madras District Municipalities Act empowering a Municipal Council to make bye-laws for the "prohibition and regulation of advertisement in public streets or parks" did not authorise the levy of a licence fee in relation to advertisement. Accordingly a person cannot be convicted for displaying goods (aerated water) on a bullock cart and having a name board in his shop without paying the fee levied by a Municipal Council for licences for advertisement.

K. Bashyam Aiyangar and *R. Desikan* for Petitioners.

The Public Prosecutor for the Crown.

K.S.

King, J.
9th April, 1941.

Achuthan and another *v.* Katteeja Bi and others.
S.A. No. 538 of 1939.

Malabar Tenancy Act (XIV of 1930), S. 20, sub-S. (5)—Eviction—Grounds—Jenmi requiring the land bona fide *for his own cultivation—Meaning of "requires".*

When a landlord demands or asks for or sues for any land on the ground that he wishes to cultivate it himself his statement that he wishes to cultivate it himself, must be made *bona fide*. There need be no element of need necessarily present. "Requires" in sub-S. (5) of S. 20 of the Malabar Tenancy Act does not mean "is in actual positive need".

Decision of Venkataramana Rao, J., in S. A. No. 42 of 1939, dissented from.

Leave to appeal granted.

K. Kuttikrishna Menon and *K. Govindan* for Appellants.

B. Pocker and *M. C. Sridharan* for Respondents.

K.S.

King, J.
15th April, 1941.

Bakshi Matra Patrudu *v.* Balakrishnamma Dora.
S.A. No. 236 of 1938.

Limitation Act (IX of 1908), Art 110—Applicability—Suit for arrears of rent—"Rent" if includes shrotriem.

After a survey of a village the Record of Rights was published in 1920. An entry was corrected in 1924 and referred to personal inams of respondent on which a *shrotriem* of Rs. 60 per annum was declared to be payable. The appellant the proprietor of the estate filed a suit under S. 173 of the Madras Estates Land Act. The suit was dismissed and an appeal therefrom was also dismissed by a judgment delivered on 21st November, 1930. Within three years of this date the proprietor filed a suit for arrears of *shrotriem* for 11 faslis (1332 to 1342).

Held, that the article of the Limitation Act applicable is Art. 110 and the arrears of rent became due annually at the end of each fasli and not in 1930 when the appeal was dismissed.

27 Mad. 143 (P.C.), distinguished.

"Shrotriem" is "rent" and the word "rent" in the Limitation Act cannot be interpreted in any restricted way.

C. Rama Rao for Appellant.

G. Chandrasekhara Sastri for Respondents.

K.S.

Wadsworth, J.
16th April, 1941.

Batcha Maistri *v.* Lakshmi Ammal.
C.R.P. No. 2132 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (h)—Scope—Possession by woman decree-holder of land worth Rs. 300—Whether excluded by exceptions in S. 4 (h).

An application under S. 19 of Act IV cannot be dismissed on the ground that the decree-holder (a woman) though owning land did not own 'property' because the land was worth only Rs. 300. S. 4 (*h*) of Act IV of 1938 protects a woman who does not own any property other than debts up to Rs. 3,000 residential house and personal adornments. Land worth Rs. 300 is clearly property not excluded by any of these exceptions.

T. S. Venkataraman for Petitioner.

S. Rangachari for Respondent.

K.S.

N R C

Horwill, J.
18th April, 1941.

Manikyala Rao *v.* Subbarao by guardian.
C.R.P. No. 338 of 1939.

Civil Procedure Code (*V of* 1908), *O.* 30, *r.* 1—*"Carrying on business"*—*Meaning.*

The expression "carrying on business" in O. 30, r. 1 should not be interpreted in too narrow a sense as meaning "the business for which the firm came into existence". To sell property, to collect debts, and to complete contracts is certainly "carrying on business". It is therefore reasonable to hold that a firm is carrying on business after dissolution until the business has been completely wound up. I.L.R. (1937) Nag. 28, referred to.

V. Subramanyam for Petitioner.

N. Vasudeva Rao for Respondent.

K.S.

The Chief Justice and Mockett, J.
24th April, 1941.

Ramanavami Sastrigal *v.* Krishna Menon.
C.M.P. Nos. 3026 to 3030 of 1939.

Practice—Appeal to Federal Court—Admission—Procedure—C. P. Code (*V of* 1908), *O.* 45, *rr.* 7 *and* 8.

When once a certificate has been granted by the Court delivering the judgment or passing the decree or final order that a substantial question of law as to the interpretation of the Government of India Act is involved, no further certificate is required and the person aggrieved is entitled to go to the Federal Court, provided that he complies with so much of r. 7 of O. 45, C. P. Code, as is incumbent on him. All that an appellant is then required to do is to provide funds for printing the record and transmitting it to the Federal Court. Thereafter the appeals will be declared to be admitted and the other requirements of r. 8 ordered.

K. P. Ramakrishna Aiyar for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Chief Justice and Venkataramana Rao, J.
24th April, 1941.

Sha Moolchand Kesarmull *v.* Associated Agencies, Madras.
O.S.A. No. 22 of 1940.

Contract—C.I.F. contract—Printed form with typewritten portion—Conflict—Construction.

If the typewritten and printed portions of a contract can be read together effect must, of course, be given to all the provisions, but if the printed portion cannot be reconciled with the typewritten portion, the typewritten portion must prevail.

K. S. Rajagopalachari and *P. V. Subramanyam* for Appellant.

T. A. Rangachari for Respondent.

K.S.

Mockett, J.
25th April, 1941.

Karichiappa Goundan—Appellant.
Criminal Appeal No. 203 of 1941.

Criminal Trial—Practice—Sessions case—Undefended accused—Desirability of Court appointing counsel amicus curiae *to defend.*

It would be well in sessions cases especially in cases of rape that a member of the bar is appointed by the Court to defend the accused.

G. Gopalaswami—amicus curiae for accused.

Public Prosecutor for the Crown.

K.S.

Lakshmana Rao, J.
29th April, 1941.

The Public Prosecutor *v.* Jevan and others accused.
Cr. App. Nos. 116 to 126 of 1941.

Motor Vehicles Act (*VIII of* 1914), *Ss.* 42 (1) and 123 (1)—*Person driving transport vehicle without permit—Liability to conviction.*

The driving of transport vehicle on the public road without a permit would contravene S. 42 (1) of the Motor Vehicles Act. That the permit is to be obtained by the owner cannot make any difference and whoever drives the vehicle in a public place without a permit authorising the use of the vehicle in that place would be punishable under S. 123 (1) of the Act.

Appellant in Person.

Respondents not represented.

K.S.

[F.B.]
The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
30th April, 1941.

Muralimohan Reddi *v.* Gangaraju and others.
Appeal Nos. 76 and 77 of 1938.

Hindu Law—Debts—Pre-partition debts—Acknowledgment by father after partition—If can keep the debts alive against divided sons.

The Chief Justice and Mockett, J. (*Krishnaswami Aiyangar, J.*, dissenting).

An acknowledgment of a pre-partition debt by the father subsequent to the partition keeps the debt alive against the sons [(1933) I.L.R. 56 Mad. 833 =65 M.L.J. 311, approved]; the true basis of the obligation of a son being to pay his father's debt irrespective of his position as manager of a joint family there is no question of an agency involved.

Per *Krishnaswami Aiyangar, J.*, (dissenting): The power to acknowledge a debt is incidental to the father's power to contract the debt and to alienate his son's share. The power comes to an end at partition and with it the power to acknowledge also comes to an end even in case of pre-partition debts.

Ch. Raghava Rao and *V. V. Sastri* for Appellants.

Sir A. Krishnaswami Aiyar and *D. Narasaraju* for Respondent.

K.S.

Venkataramana Rao, J.
30th April, 1941.

Kurien *v* Municipal Council, Hindupur.
S.A. No. 320 of 1938.

Madras District Municipalities Act (*V of* 1920), *S.* 250—*Wrongful refusal to grant a licence to run cinema—Liability of Municipal Council for damages.*

When the appellant applied to the municipal council for a licence to run a touring cinema the councillors at a meeting called on the appellant to furnish a civil engineer's certificate regarding the condition of the tent. The appellant furnished such a certificate on 5th May, 1934. In a suit for damages against the council for wrongful refusal to grant a licence,

Held, that when all the conditions imposed by the Municipal Council were complied with it was the duty of the council to issue the licence and the non-performance of that duty amounted to a misfeasance for which the council was liable for damages. The failure to issue the licence was not a mere non-feasance.

V. Govindarajachari and *A. Bhujanga Rao* for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

The Chief Justice and Gentle, J.
2nd May, 1941.

Subramania Sarma and others (Petitioners)
Crl. R. C. Nos. 442 and 443 of 1941 (Cr. R. P. Nos. 418 and 419 of 1941).

Legal Practitioner—Advocate an accused—If can appear for his co-accused in the same case—Madras Criminal Rules of Practice, r 82*—Scope.*

An advocate who is an accused in a criminal case cannot appear and act for the co-accused in the same case. R. 82 of the Criminal Rules of Practice does not authorise a co-accused to appear as counsel in the case.

9 H.L.C. 711=11 E.R. 907 and 19 L.J. (C.P.) 374, relied on.

K. Bhashyam Aiyangar for *P. S. Kailasam* and *B. Jagannadha Das* for *S. Suryaprakasam* and *S. Viswanathan* for Petitioners.

The Crown Prosecutor (*P. Govinda Menon*) with *C. D. Venkataraman* for the Crown.

K.S.

Pandrang Row and Abdur Rahman, JJ.
2nd May, 1941.

Mahadeva Royal *v.* Veerabasava Chikka Royal.
C.M.P. No. 1933 of 1941.

Civil Procedure Code (*V of* 1908), *Ss.* 109 *and* 110*—"Substantial questions"—What are.*

A decision in regard to the non-admissibility of documents is a substantial question which would entitle the aggrieved party to have a certificate for leave to appeal to the Judicial Committee.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *B. C. Seshachala Aiyar* and *K. Seshagiri Rao Naidu* for Petitioner.

T. R. Venkatarama Sastriar, N. C. Vijayaraghavacharar and *A. C. Sampath Aiyangar* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ.
2nd May, 1941.

Seshayya *v.* Venkataramayya.
A.A.O. No. 580 of 1938 converted into C.R.P. No. 684 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 23*—Scope—Sale held just one week after Act IV of* 1938 *came into force—Whether governed by S.* 23.

Section 23 only relates to sales held between the 1st October, 1937 and the 22nd March, 1938 and has no application to a sale held one week after the Act came into force.

K. Kotayya for Petitioner.

K. Raguramiah for Respondent.

K.S.

Horwill, J.
2nd May, 1941.

Karsandas & Brothers *v.* South Indian Railway Co., Ltd.
C.R.P. No. 982 of 1939.

Common carrier—Railway—Carriage of goods—Liability for damages caused by rain water.

If a railway company undertakes to carry perishable goods or to carry goods that will be injured by rain water, as most goods are, it should take precautions to see that rain water does not come into contact with the goods. The railway company will be liable for damages caused by its negligence in not taking such precautions.

N. R. Sesha Aiyar for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

K.S.

[END OF VOLUME 1941—I]